

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,529

*United States Court of Appeals
For the
District of Columbia Circuit*
FILED DEC 19 1952

THE FLYING TIGER LINE, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

Petition for Judicial Review of an Order of the Civil
Aeronautics Board

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Petition for Judicial Review of an Order of the Civil
Aeronautics Board

JOINT APPENDIX

I.

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS

*To the Honorable, the Judges of the United States Court
of Appeals for the District of Columbia:*

The Flying Tiger Line Inc. (hereinafter sometimes referred to as "Tigers") presents this petition for judicial

review of an Order entered by the Civil Aeronautics Board (hereinafter sometimes referred to as the "Board") and in support of said petition respectfully represents and alleges as follows:

I.

THE NATURE OF THE PROCEEDING.

1. This Petition seeks review of an Order (Serial No. E-6539, dated June 20, 1952) entered by the Board and of the supporting findings and conclusions set forth therein, which Order determined that Official Passenger Charter Tariff No. 2, C.A.B. No. 23, filed by Tigers was unlawful and directed to be cancelled, on the ground that Tigers does not have legal authority under Section 401 of the Civil Aeronautics Act of 1938, as amended (49 USC 401 et seq), to make charter trips carrying persons and their baggage. Serial Order E-6539 was entered by the Board in a consolidated proceeding known as

In the Matter of Charter Rules, Regulations, and Charges for the air transportation of persons and baggage proposed by The Flying Tiger Line Inc., pursuant to its Official Passenger Charter Tariff No. 2, C.A.B. No. 23, and by Resort Airlines, Inc., contained in its Special Service Tariff No. 1, C.A.B. No. 9, and its Charter Tariff No. 3, C.A.B. No 11, *Docket No. 4924 et al.*

Tigers seeks judicial review of said Order E-6539 only insofar as the same deals with the Official Passenger Charter Tariff No. 2, C.A.B. No. 23, filed by it.

II.

JURISDICTION

2. The Petition is filed pursuant to Section 1006 of the Civil Aeronautics Act of 1938, as amended (49 USC § 646). As will hereinafter appear, Tigers has a substantial interest in the Order of the Board complained of herein, within the meaning of § 1006 of the Civil Aeronautics Act of 1938, as amended.

III.

THE RELIEF PRAYED

3. Tigers prays that the following Order of the Board be reviewed and set aside by this Court:

Serial Order E-6539, dated June 20, 1952, which, among other things, declared unlawful and directed to be cancelled Official Passenger Charter Tariff No. 2, C.A.B. No. 23, filed by The Flying Tiger Line Inc.

Tigers requests that a copy of the Petition be transmitted to the Board and that the Board be required to certify and file in this Court a transcript of the record upon which the aforesaid Order was entered, in accordance with § 1006 of the Civil Aeronautics Act of 1938, as amended; that upon the review requested herein the said Order of the Board be set aside insofar as it finds the aforesaid Charter Tariff unlawful; and that this Court grant Tigers such other and further relief as the Court may deem proper.

IV.

STATEMENT OF FACTS AND THE POINTS UPON WHICH
THE PETITIONER INTENDS TO RELYA. *Statement of Facts*

4. Tigers, a corporation organized under the laws of the State of Delaware and having its principle offices at Lockheed Air Terminal, Burbank, California, is an air carrier operating under a temporary Certificate of Public Convenience and Necessity issued by the Board on August 12, 1949, for a period of five years. Under its temporary Certificate, Tigers is authorized to establish and has established scheduled airfreight service between the Eastern Seaboard and the West Coast, with stops in important industrial areas of the Midwest, on a route designated Route 100. In addition to its common carriage airfreight operations on Route 100, Tigers has built a substantial complementary business broadening and diversifying its operations. Such

diversification has been obtained, in part, by the development of plane-load airfreight and passengers movements on a charter basis.

5. Tigers, pursuant to Part 207 of the Economic Regulations of the Board effective May 1, 1951, filed with the Board its Official Passenger Charter Tariff No. 2 C.A.B. No. 23, for effectiveness on May 26, 1951.

6. American Airlines Inc., Eastern Airlines Inc., Trans World Airlines, Inc., and United Airlines, Inc., filed with the Board individual complaints alleging that the aforesaid tariff was unlawful and requested the Board to reject or suspend the aforesaid tariff, C.A.B. Dockets 4924 and 4927.

7. Tigers filed answers to the complaints and requested the Board to dismiss said complaints.

8. By Serial Order E-5414, dated May 25, 1951, entered in Docket 4924, the Board suspended said Official Passenger Charter Tariff No. 2, C.A.B. No. 23, filed by Tigers, and ordered an investigation to determine whether the rules, regulations, rates and charges contained in the aforesaid tariff were unlawful.

9. By Serial Order E-5616, dated August 15, 1951, entered in Docket 4924, the Board continued the period of suspension of said tariff to November 21, 1951.

10. By Order of the Board dated July 7, 1951, Serial No. E-5526, an investigation was instituted to determine whether the fares, charges, rules and regulations contained in Resort Airlines, Inc.'s Special Services Charter No. 1, C.A.B. No. 9, and Charter Tariff No. 3, C.A.B. No. 11, including revisions and reissue thereof, were lawful. By that Order the Board consolidated the Resort case, Docket 5007, into the investigation of Tigers' aforesaid tariff, Docket 4924, instituted by Serial No. E-5414.

11. American Airlines, Inc., Eastern Airlines, Inc., Trans World Airlines, Inc., and United Air Lines, Inc., were made

parties to the proceedings in Docket 4924 so consolidated; Chicago and Southern Airlines, Inc., was granted leave to intervene. After due notice to the public and all parties, a public hearing was held and briefs and reply briefs to the Examiner were filed by the parties.

12. On April 20, 1952, this matter was argued before the Board and on June 20, 1952, the Board issued its order, Serial No. E-5639, in which, among other things, the Board determined Official Passenger Charter Tariff No. 2, C.A.B. No. 23, filed by The Flying Tiger Line Inc., as an air carrier certificated to carry property only, unlawful and directed to be cancelled, on the ground that the air carrier does not have legal authority under Section 401 of the Civil Aeronautics Act of 1938, as amended, to engage in air transportation carrying persons and their baggage on charter trips.

B. Points upon which Petitioner intends to rely.

13. The Board erred in holding the aforesaid Passenger Charter Tariff unlawful for the reason that the Board erroneously construed the statutory authority granted all air carriers to engage in charter trips and to perform other special services as contained in the last sentence of Section 401(f) of the Civil Aeronautics Act of 1938, as amended (49 USC 481(f)), which reads as follows:

Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board.

14. The Board erred in holding the aforesaid Passenger Charter Tariff unlawful in that it fails to follow but departed from Part 207 of its own Economic Regulations (14 CFR Chapter I) promulgated under Section 401(f) of the Civil Aeronautics Act of 1938, as amended, to govern charter trips and other special services, effective May 1,

1951, on which Economic Regulations Tigers, and others, have been and are entitled to rely.

V.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that the aforesaid Order of the Civil Aeronautics Board, Serial No. E-5639, dated June 20, 1952, be reviewed by this Court insofar as it relates to Official Passenger Charter Tariff No. 2, C.A.B. No. 23, filed by The Flying Tiger Line Inc., that a copy of this Petition be transmitted to Civil Aeronautics Board, that the transcript of the record upon which said Order was rendered be thereupon certified and filed by the Board in this Court in accordance with Section 1006 of the Civil Aeronautics Act of 1938, as amended (49 USC 646) and that upon such review, the Court set aside the aforesaid Order to the extent that it holds said Official Passenger Charter Tariff No. 2, C.A.B. No. 23, unlawful. Your Petitioner further prays for such other and further and different relief as to this Court may seem just and proper in the premises.

Dated August 18, 1952.

Respectfully submitted

THE FLYING TIGER LINE INC.

By

NORMAN L. MEYERS,
Attorney for Petitioner,
201 Shoreham Building,
Washington 5, D. C.
Telephone: STerling 5959.

MEYERS & BATZELL,
201 Shoreham Building,
Washington 5, D. C.
Of Counsel.

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UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Temporary Certificate of Public Convenience and Necessity

THE FLYING TIGER LINE INC.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to property between any point or points specified in any of the following paragraphs numbered 1 through 8 below and any point or points specified in any other of said paragraphs:

1. The terminal point Los Angeles, Calif., the intermediate points Bakersfield, Calif., Brawley-El Centro, Calif., Fresno, Calif., Long Beach, Calif., Oakland, Calif., Sacramento, Calif., Salinas-Monterey, Calif., San Diego, Calif., San Francisco, Calif., Santa Barbara, Calif., Stockton, Calif., and Thermal, Calif.;
2. The intermediate points Longview, Wash., Portland, Oreg., Seattle, Wash., Wenatchee, Wash., and Yakima, Wash.;
3. The intermediate point Minneapolis-St. Paul, Minn.;
4. The intermediate point Denver, Colo.;
5. The intermediate points Des Moines, Iowa, and Omaha, Nebr.;
6. The intermediate points Akron, Ohio, Chicago, Ill., Cleveland, Ohio, Detroit, Mich., Fort Wayne, Ind.,

1951, on which Economic Regulations Tigers, and others, have been and are entitled to rely.

V.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that the aforesaid Order of the Civil Aeronautics Board, Serial No. E-5639, dated June 20, 1952, be reviewed by this Court insofar as it relates to Official Passenger Charter Tariff No. 2, C.A.B. No. 23, filed by The Flying Tiger Line Inc., that a copy of this Petition be transmitted to Civil Aeronautics Board, that the transcript of the record upon which said Order was rendered be thereupon certified and filed by the Board in this Court in accordance with Section 1006 of the Civil Aeronautics Act of 1938, as amended (49 USC 646) and that upon such review, the Court set aside the aforesaid Order to the extent that it holds said Official Passenger Charter Tariff No. 2, C.A.B. No. 23, unlawful. Your Petitioner further prays for such other and further and different relief as to this Court may seem just and proper in the premises.

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Respectfully submitted

THE FLYING TIGER LINE INC.

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NORMAN L. MEYERS,
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1. The terminal point Los Angeles, Calif., the intermediate points Bakersfield, Calif., Brawley-El Centro, Calif., Fresno, Calif., Long Beach, Calif., Oakland, Calif., Sacramento, Calif., Salinas-Monterey, Calif., San Diego, Calif., San Francisco, Calif., Santa Barbara, Calif., Stockton, Calif., and Thermal, Calif.;
2. The intermediate points Longview, Wash., Portland, Oreg., Seattle, Wash., Wenatchee, Wash., and Yakima, Wash.;
3. The intermediate point Minneapolis-St. Paul, Minn.;
4. The intermediate point Denver, Colo.;
5. The intermediate points Des Moines, Iowa, and Omaha, Nebr.;
6. The intermediate points Akron, Ohio, Chicago, Ill., Cleveland, Ohio, Detroit, Mich., Fort Wayne, Ind.,

Grand Rapids, Mich., Milwaukee, Wis., South Bend, Ind., and Toledo, Ohio;

7. The intermediate points Albany, N. Y., Binghamton, N. Y., Boston, Mass., Buffalo, N. Y., Hartford, Conn., New York, N. Y., Newark, N. J., Philadelphia, Pa., Providence, R. I., and Rochester, N. Y.;

8. The intermediate point Rockland, Maine, and the terminal point Portland, Maine;
to be known as Route No. 100.

2 The service herein authorized is subject to the following terms, conditions, and limitations:

(1) The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board, and may begin or terminate, or begin and terminate, trips at points short of terminal points;

(2) The holder may render a scheduled nonstop service between any two points not consecutively named herein between which service is authorized hereby, without compliance with the provisions of Part 202 of the Economic Regulations;

(3) Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may regularly serve a point named herein through any airport convenient thereto;

(4) The holder may transport, at the expense of the shipper, one or more attendants with each shipment of live animals, live birds, and live reptiles when necessary for the protection of the shipment, other cargo, or the aircraft or its crew. Such attendant may be transported only when actually accompanying the shipment and may not be transported from the destination of the shipment to its origin or otherwise;

(5) The holder shall not carry property shipped by Railway Express Agency, Inc., pursuant to the exemption authorization contained in Order Serial No. 941, dated March 13, 1941, as amended by Order Serial No. 5149, dated September 3, 1946.

The exercise of the privileges granted by this certificate shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate shall be effective on the 12th day of August, 1949 and shall continue in effect for a period of five years.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this certificate to be executed by its Chairman and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, on the 29th day of July, 1949.

/s/ JOSEPH J. O'CONNELL, JR.
Chairman

(SEAL)

ATTEST:

/s/ M. C. MULLIGAN
Secretary

2A Received Civil Aeronautics Board (Tariffs)

11673 Apr 23 '51 Tariffs Section

Flying Tiger Line Passenger Charter Tariff No. 2

OFFICIAL FILE

C.A.B. No. 23
issued in lieu of
C.A.B. No. 22
rejected by the Board
Original Title Page

This tariff suspended so far as applicable to interstate
and for overseas air transportation No. 21, 1951.

By Order E 5616 in Docket 4924.

THE FLYING TIGER LINE INC.

OFFICIAL PASSENGER CHARTER TARIFF No. 2

Containing

Rules, Regulations, Rates and Charges

Applicable to

Charter Flight Service for Persons and Baggage

Between

All points within the Continental Limits of the United
States and between points outside the Continental Limits
of the United States and from or to points within the Con-
tinental Limits of the United States and points outside the
Continental Limits of the United States.

ISSUED: April 26, 1951

ISSUED BY: Robert V. Woodworth, Manager, Rates and
Tariffs, Lockheed Air Terminal, Burbank, California.

EFFECTIVE: May 26, 1951

2B CORRECTION NUMBER CHECK SHEET

Each time revised or additional original pages are received, check marks should be made on the check sheet opposite the correction numbers corresponding to those appearing in the lower right-hand corner of the revised or additional original pages. If pages should not be received bearing consecutive correction numbers, the issuing officer should be requested to furnish the page bearing the correction number for which a page has not been received.

CORRECTION NUMBERS

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21
22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38

EXPLANATION OF ABBREVIATIONS AND REFERENCE MARKS

C.A.B.	Civil Aeronautics Board	♠	Denotes reduction
Inc.	Incorporated	♦	Denotes increase
No.	Number	▲	Denotes change in
\$	United States Dollars		wording which re-
			sults in neither in-
			creases nor de-
			creases
		■	Denotes addition or
			new item
		×	Denotes cancellation

For explanation of abbreviations and reference marks, see above.

• • • • •

2C SECTION I—GENERAL RULES

Rule

No.

1 DEFINITIONS

As used in this tariff, unless the context otherwise requires.

- (a) *Carrier* means The Flying Tiger Line Inc.
- (b) *Chartered Aircraft* means an aircraft operated by Carrier expressly for a charterer.
- (c) *Charterer* means a person, group of persons, partnership or corporation who, at a fixed charge, acquire the use of an aircraft operated by Carrier for the transportation of persons and baggage from a specified origin to a specified destination or for a particular itinerary, agreed upon in advance.
- (d) *Charter Passenger* means any passenger carried on a charter flight.
- (e) *Charter Flight* means air transportation and incidental service furnished by Carrier to a Charterer in a chartered aircraft beginning at the time the aircraft is ordered for occupancy at origin and ending with the final discharge at destination.
- (f) *Chartered Miles* means miles which chartered aircraft is operated by Carrier for Charterer, carrying passengers and baggage.
- (g) *Ferry Miles* means miles which Carrier is required to operate an aircraft without payload between the point where it is available and the origin of a charter flight and/or between the destination of a charter flight and the point to which the aircraft is to be returned for next use, also such other movements of the chartered aircraft, unoccupied by passengers and/or their baggage, or equipment, as may be necessary to provide the kind of a trip Charterer desires.

2 APPLICATION OF TARIFF

- (a) The rates, charges, rules and regulations named herein apply to the air transportation of persons and baggage in chartered aircraft operated by

Carrier pursuant to contract executed on or after the effective date hereof.

For explanation of abbreviations and reference marks, see page 1.

* * * * *

2D SECTION I—GENERAL RULES

Rule
No.

3 APPLICATION OF RATES

- (a) Charter rates and charges published in this tariff are subject to availability and assignment of Carrier's aircraft, and shall apply only in connection with the charter of aircraft, operated by Carrier as a common carrier for compensation or hire, for the air transportation of persons and baggage.

4 PAYMENT

- (a) Charterer shall pay Carrier in full, immediately upon presentation of invoice, for air transportation and accessorial service, if any in accordance with this tariff.

5 CURRENCY

- (a) Rates and charges named herein are stated in dollars and are payable in lawful currency of the United States.

6 TAXES

- (a) Taxes, if any, imposed by governmental authority on air transportation or accessorial services in connection with chartered aircraft are in addition to charter rates named herein and are to be paid by the Charterer.

7 OPERATION, INTERRUPTION OR CANCELLATION OF CHARTER FLIGHTS

- (a) Carrier shall have exclusive control over chartered aircraft and crews thereof. All persons provided transportation on chartered aircraft shall comply with all rules and regulations of Carrier, and all persons and baggage aboard chartered aircraft shall be subject to the authority of the Captain in charge.
- (b) Carrier reserves the right, in its sole discretion,
 - (1) To determine the route to be flown and the airports to be used and whether or not any flight shall be operated.
 - (2) To limit, for operational reasons, the number of passengers, and the weight, size, type, contents and value of baggage.

For explanation of abbreviations and reference marks, see page 1.

* * * * *

2E

SECTION I—GENERAL RULES

Rule

No.

7 OPERATION, INTERRUPTION OR CANCELLATION OF CHARTER FLIGHTS (Continued)

- (3) To refuse passage to any person whose condition may, in the opinion of the Carrier, involve hazard or risk to himself, or other persons.
- (4) To examine the contents of all baggage and to reject improperly packed or otherwise defective baggage.
- (c) Carrier reserves the right to cancel any charter flight or any portion thereof at any time, either prior to departure or during the course of flight or

at any other time, and further to turn back in flight and return to the point of departure or to land at any alternative airport at destination or at any other airport in the event Carrier, in its sole and absolute discretion, deems such procedure advisable or necessary, or to fail to stop at any intermediate point without liability to any persons whomsoever.

8 LIABILITY OF CARRIER

- (a) In no event shall Carrier be liable to the Charterer for any injury to or death of or for the loss of services of any person employed by the Charterer (whether such person is employed by contract or otherwise), for any reason whatsoever except for the negligence of Carrier, its agents, servants or employees.
- (b) In the event of cancellation or interruption of flight where Charterer has made payment in advance, Carrier's liability to Charterer shall be limited to refunding the difference between the amount paid in advance and the amount to which Carrier is entitled under this tariff by reason of the air transportation and other services actually performed.
- (c) Carrier shall not be liable for the failure of aircraft to depart or arrive according to any schedule, agreement or otherwise.
- (d) The furnishing of any air transportation pursuant to this tariff is subject to, and Carrier shall not be liable for, loss, injury, damage, delay or any other result caused by mechanical difficulties, riots, wars, civil commotions, strikes, labor disputes, weather conditions, acts of God, public enemies, quarantine, the absence of any necessary governmental approvals or any other cause, whether of the same or different nature, beyond its control.

For explanation of abbreviations and reference marks, see page 1.

* * * * *

2F SECTION I—GENERAL RULES

Rule
No.

9 PASSENGERS AND BAGGAGE

- (a) Passengers and baggage will be carried within the space and weight limitations of the aircraft, as specified by the Carrier. Excess baggage charges will not apply.

10 OTHER SERVICES

- (a) Rates named herein do not include ground transportation in connection with any charter flight. Upon request of the Charterer, Carrier will assist Charterer in securing ground transportation, hotel reservations and other services. In such event, Carrier shall act only as Charterer's agent, and Charterer shall bear the cost of all such services and all risks of injury, damage or loss arising out of such services.
- (b) Space and weight permitting, one or more employees of Carrier, in addition to the regular crew of each chartered aircraft, may accompany any charter flight to serve as flight coordinator.

11 CLAIMS

- (a) No action shall be maintained for loss or damage to the baggage of a passenger, or for injury to his person or for any delay in transportation, unless notice of the claim is presented in writing to the General Office of the carrier within 30 days after the occurrence of the loss, damage, injury, or delay,

and unless the action is actually commenced within one year after such occurrence.

For explanation of abbreviations and reference marks, see page 1.

* * * * *

2G SECTION II—RATES AND CHARGES

- 1 Rates and charges applicable between points within the Continental Limits of the United States.

Equipment	Charter Rate Per Mile	Ferry Rate Per Mile
C-46	\$1.25	\$.85
C-54	1.50	1.25

- 2 Rates and charges applicable to charters operated via the Atlantic Ocean, between points within the Continental Limits of the United States and points within the Continents of Europe, Africa and points within the Continental Limits of India.

- a. Applies from May 26, 1951 to and including July 19, 1951.

Equipment	Charter Rate Per Mile
C-54	\$2.90 Eastbound 1.20 Westbound

- b. Applies from July 20, 1951 to October 1, 1951, inclusive.

Equipment	Charter Rate Per Mile
C-54	\$1.20 Eastbound 2.90 Westbound

- 3 Rates and charges applicable between points outside the Continental Limits of the United States, and from or to points within the Continental Limits of the United

States from or to points outside the Continental Limits of the United States, except between points as outlined in Paragraph 2.

Equipment	Charter Rate Per Mile	Ferry Rate Per Mile
C-46	\$1.25	\$.85
C-54	1.75	1.20

For explanation of abbreviations and reference marks, see page 1.

2H Received Civil Aeronautics Board (Tariffs)
12088 Jun 29 '51 Tariffs Section

Supplement No. 1 to C.A.B. No. 23

Suspension Supplement

THE FLYING TIGER LINE INC.

Supplement No. 1

to

OFFICIAL PASSENGER CHARTER TARIFF No. 2

Containing

Rules, Regulations, Rates and Charges

Applicable to

Charter Flight Service for Persons and Baggage
Between

All points within the Continental Limits of the United States and between points outside the Continental Limits of the United States and from or to points within the Continental Limits of the United States and points outside the Continental Limits of the United States.

This Supplement is issued for the purpose of suspending C.A.B. No. 23 insofar as applicable to interstate and/or overseas air transportation pursuant to the Civil Aeronautics Board Order Serial Number E-5414, dated May 25, 1951.

Issued: July 2, 1951

This Supplement expires with August 23, 1951, unless sooner cancelled, changed or extended.

ISSUED BY: Robert V. Woodworth, Manager, Rates and Tariffs, Lockheed Air Terminal, Burbank, California

2I Supplement No. 2 to C.A.B. No. 23

Suspension Supplement

THE FLYING TIGER LINE INC.

Supplement No. 2

to

OFFICIAL PASSENGER CHARTER TARIFF No. 2

Containing

Rules, Regulations, Rates and Charges

Applicable to

Charter Flight Service for Persons and Baggage

Between

All points within the Continental Limits of the United States and between points outside the Continental Limits of the United States and from or to points within the Continental Limits of the United States and points outside the Continental Limits of the United States.

This Supplement is issued for the purpose of further suspending C.A.B. No. 23 insofar as applicable to interstate and/or overseas air transportation pursuant to the Civil Aeronautics Board Order Serial Number E-5616, dated August 15, 1951.

Issued: August 24, 1951

This Supplement expires with November 21, 1951, unless sooner cancelled, changed or extended.

EXPIRED

* * * * *

2J Received Civil Aeronautics Board (Tariffs)
 14287 Jul 17 '52 Tariffs Section
 Supplement No. 3 to C.A.B. No. 23
 Cancellation Supplement
 THE FLYING TIGER LINE INC.
 Supplement No. 3
 to
 OFFICIAL PASSENGER CHARTER TARIFF No. 2
 Containing
 Rules, Regulations, Rates and Charges
 Applicable to
 Charter Flight Service for Persons and Baggage
 Between

All points within the Continental Limits of the United States and between points outside the Continental Limits of the United States and from or to points within the Continental Limits of the United States and points outside the Continental Limits of the United States.

This Supplement is issued for the purpose of cancelling all tariff matters in C.A.B. No. 23.

Issued on one (1) day's notice to the public and the Civil Aeronautics Board on authority of C.A.B. Order Serial No. E-6539, dated June 20, 1952.

ISSUED: July 18, 1952

ISSUED BY: Robert V. Woodworth, Manager, Rates and Tariffs, Lockheed Air Terminal, Burbank, California

EFFECTIVE: July 19, 1952

* * * * *

Orders
 Serial No. E-5414

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board at its office in
Washington, D. C. on the 25th day of May 1951.

Docket No. 4924

In the matter of charter rules, regulations, rates and
charges for the air transportation of persons and
baggage proposed by

THE FLYING TIGER LINE, INC.

pursuant to its Official Passenger Charter Tariff
No. 2, C.A.B. No. 23.

Order of Investigation and Suspension

The Flying Tiger Line, Inc. having filed with the Board proposed rules, regulations, rates and charges applicable to charter flight service for persons and baggage "between all points within the continental limits of the United States and between points outside the continental limits of the United States and from or to points within the continental limits of the United States and points outside the continental limits of the United States" contained in its Official Passenger Charter Tariff No. 2, C.A.B. No. 23;

American Airlines, Inc., Eastern Air Lines, Inc., Trans World Airlines, Inc., and United Air Lines, Inc., having filed with the Board formal complaints alleging that the aforesaid tariff is unlawful and requesting the Board to reject or suspend the aforesaid tariff, Dockets Nos. 4924 and 4927, and The Flying Tiger Line, Inc., having filed answers to the complaints requesting the Board to dismiss said complaints;

The Board having considered the complaints, answers, and the aforesaid rules, regulations, rates and charges, and it appearing to the Board that the aforesaid rules, regula-

tions, rates and charges may be unlawful because applicable to air transportation of passengers which the carrier has not been authorized to perform under Section 401 of the Civil Aeronautics Act of 1938, as amended, or otherwise;

The Board, acting pursuant to the powers vested in it by the Civil Aeronautics Act of 1938, as amended, particularly Sections 205(a), 401, 403, and 1002 thereof, and finding that its action herein is necessary and appropriate in order to carry out the provisions and objectives of the Act, and to exercise and perform its powers and duties thereunder;

IT IS ORDERED THAT:

1. An investigation be and hereby is instituted to determine whether the rules, regulations, rates, and charges contained in the aforesaid tariff, are unlawful;

2. Pending such investigation and hearing and decision by the Board, the aforesaid tariff so far as applicable to interstate and/or overseas air transportation be and it hereby is suspended and its use deferred to and including August 23, 1951, unless otherwise ordered by the Board, and that no changes whatsoever be made therein during the period of suspension, except by order or special permission of the Board;

3. The issues raised in the complaints of American, Eastern, TWA and United with respect to the tariff proposed by Flying Tiger, Dockets Nos. 4924 and 4927, and Flying Tiger's answers thereto be consolidated into the proceeding of investigation instituted by this order, Docket No. 4924;

4. The consolidated proceeding ordered herein be assigned for hearing before an examiner of the Board at a time and place hereafter to be designated; and

5. A copy of this order be filed with the aforesaid tariff and a copy be served upon The Flying Tiger Line, Inc.,

American Airlines, Inc., Eastern Airlines, Inc., Trans World Airlines, Inc. and United Air Lines, Inc. which are hereby made parties to this proceeding.

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN
M. C. Mulligan
Secretary

(SEAL)

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UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket No. 4924, *et al.*

In the matter of charter rules, regulations, rates, and charges for the air transportation of persons and baggage proposed by

THE FLYING TIGER LINE, INC.

pursuant to its Official Passenger Charter Tariff No. 2, C.A.B. No. 23.

Docket No. 5007

In the matter of the fare, charges, rules, and regulations for the air transportation of persons and baggage of

RESORT AIRLINES, INC.

published in its Special Services Tariff No. 1, C.A.B. No. 9 and Charter Tariff No. 3, C.A.B. No. 11.

Stipulation

It is hereby stipulated and agreed by and between counsel for the parties herein and the undersigned counsel for the Bureau of Air Operations, Civil Aeronautics Board that

the following identified documents shall, by this agreement, be considered a part of the record in the above-entitled proceedings:

1. Excerpts from the Record in the Skycruise Case, identified as AAL Exhibit No. 1;
2. Matter From Docket No. 810 Et Al., The Air Freight Case, Requested By Eastern Air Lines To Be Stipulated, identified as Eastern Air Lines' Exhibit No. 1;
3. The Statements by Resort Airlines, Inc., identified as RAL Exhibit No. 1 and RAL Exhibit No. 2;
- 100 4. Exceprts From Resort Airlines Exhibits And Testimony In The Skycruise Case, Docket No. 2377, Et Al., identified as UAL Exhibit No. 1;
5. All tariffs and amendments thereto and revisions and reissues thereof of (a) The Flying Tiger Line, Inc., and (b) Resort Airlines, Inc., presently on file with the Civil Aeronautics Board, i.e., prior to and including October 15, 1951, or which may be filed with the Civil Aeronautics Board subsequent to October 15, 1951 up to and including the date of final decision by the Board in the above-identified proceedings; and
6. The original and amended certificates of public convenience and necessity which have been issued by the Civil Aeronautics Board (or Civil Aeronautics Authority) to all air carriers prior to and including October 15, 1951, or which may be issued by the Civil Aeronautics Board subsequent to October 15, 1951, up to and including the date of final decision by the Board in the above-identified proceedings.

Signed:

American Airlines, Inc., by

THOMAS F. BROSNAN

on October 19, 1951

Eastern Airlines, Inc., by

G. WESLEY CHANNELL

on October 19, 1951

The Flying Tiger Line, Inc., by

NORMAN L. MEYERS

on October 19, 1951

Resort Air Lines, Inc., by

GEORGE O. NEAL

on October 19, 1951

Trans World Airlines, Inc., by

GORDON W. BICKERT

on October 19, 1951

United Air Lines, Inc., by

FLOYD M. RETT

on October 19, 1951

Bureau of Air Operations,

Civil Aeronautics Board, by

JAMES A. TOMLINSON

on October 19, 1951

* * * * *

Eastern Exhibit No. 1

BEFORE THE CIVIL AERONAUTICS BOARD

Docket 4924

In the matter of charter rules, regulations, rates, and charges for the air transportation of persons and baggage proposed by

THE FLYING TIGER LINE, INC.

pursuant to its Official Passenger Charter Tariff No. 2,
C.A.B. No. 23.

Docket No. 5007

In the matter of the fare, charges, rules, and regulations for the air transportation of persons and baggage of

RESORT AIRLINES, INC.

published in its Special Services Tariff No. 1, C.A.B.
No. 9 and Charter Tariff No. 3, C.A.B. No. 11.

**MATTER FROM DOCKET 810 ET AL.,
THE AIR FREIGHT CASE, REQUESTED BY EASTERN AIR LINES
TO BE STIPULATED**

Eastern Air Lines, Inc. ("Eastern") requests that the following material be stipulated pursuant to the directive contained in the prehearing conference report in the above-styled proceeding.

THE FLYING TIGER APPLICATION.

"IV. Applicant hereby requests that it be granted a temporary or permanent Certificate of Public Convenience and Necessity authorizing it to engage in the transportation of freight by air in regularly scheduled operations along the routes set out below from each of the points listed in Column 1 to each of the points listed in Column 2:"

"IX. Applicant seeks authority to transport freight as a common carrier between the points and areas named in Paragraphs IV and V of this application; however, in the conduct of its business, Applicant, may upon occasion, transport, without compensation, persons connected with the Applicant or with shippers who may use the Applicant's service. In the event authorization is needed for such transportation, such authorization is hereby applied for. This application may, if the Board desires, also be considered as an application for the transportation of mail and parcel post."

FLYING TIGER EXHIBIT NSF-10.

132 "In the past the Corporation also carried contract passengers. It is contemplated that when the certification applied for in this Hearing is granted, the Corporation will have no passenger traffic. Contract passenger business has now turned over to a wholly owned subsidiary, Flying Tiger Transport, Inc. That Corporation was organized August 9, 1946. It is engaged in the business of transporting charter parties of organized groups such as athletic teams, bands, theatrical troupes and business groups. This subsidiary and its activities are not party to or affected by the application of the parent corporation, the subject of this hearing."

TESTIMONY OF ROBERT PRESCOTT (Tr. pp. 5363-6).

"By Mr. Gribbon:

"Q. Mr. Prescott, is this ATC contract confined to freight operations? A. No. We don't control the loads on the airplanes. It is all Army manifested and loaded. Passengers, mail, express, or freight, whatever they want to put on. We just spot the airplanes on their schedules. We don't schedule them.

"Q. It is your understanding that the load will consist of passengers, freight, mail, anything the Army wants to send? A. Anything the Army wants to send.

"Q. Throughout your existence you have carried passengers, have you not? A. That is correct.

"Q. And was it around the date of this application that you segregated your passenger operations into a separate corporation? A. The date of this application was—

"Examiner Cusick: The date is part of the record and may be stipulated.

"The Witness: Well, approximately. We segregated these because while there was some attractive contract passenger business, we could see in it development of the law that it was our belief cargo carriers, as such, are strictly cargo carriers, and would be given a chance to develop. We wanted to get a chance to be entirely free in our own company, our main company, from any passenger business.

"By Mr. Gribbon:

"Q. You all own stock in this subsidiary that conducts passenger operations? A. That is correct.

"Q. Do you operate the passenger business as a separate division of your corporation? A. That is correct. We have even transferred the titles of the airplanes over, and naturally there is a great deal of integration. We have just separated as much as possible.

"As a matter of fact, we have found the contract passenger business is not what we thought it would be, and we have just about abandoned it.

"Q. Are you the president of the corporation that runs the passenger business? A. Of the subsidiary?

"Q. Yes. A. No.

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"Q. The subsidiary that operates the passenger end of the business makes use of the National Skyway Freight facilities, does it not? A. Yes. They are charged off.

"Q. Maintenance facilities? A. Yes. We charge the cost of their operation to the subdivision, to the corporation.

"Q. And National Skyway Freight Corporation's overhead is then spread between the freight operation conducted by the parent company and the passenger operation conducted by the subsidiary? A. Not entirely, no.

"Q. I don't mean equal, but it is allocated between the two operations, is it not? A. No. The charges assessed to the passenger operation are not per hour maintenance cost of operating the airplane, the depreciation of their equipment, the actual salary of those people directly engaged in it.

"For instance, I doubt if any of our administrative personnel on the cargo operation is charged to the passenger business.

"Q. Do you devote any of your time to the operation of the subsidiary doing passenger work? A. As I said, we are just about abandoning that. The reason we started, it seemed at that time, there was a great demand for these tours by both athletic groups and entertainment groups. We carried several, including Abbott and Costello, Bob Feller's baseball team, and tours.

"It looked then like a good business, and it has fallen off considerably, and we don't think we want to continue it."

TESTIMONY OF ROBERT PRESCOTT (Tr. pp. 5305-7).

"In presenting the case for the Flying Tiger Line at this late stage of the hearings in the Air Freight Case, I can best orient this company's position by

starting anew the postulates upon which our case is predicated.

“(1) Air Freight is bulk cargo

“(2) Air freight requires freight planes and special equipment. The shipment of air freight in bulk volume cannot be handled in passenger planes incidental to passenger traffic.

“Because of the weight and volumes involved air freight cannot be placed in the limited space available in passenger planes for freight.

“Furthermore, air freight cannot be on and off loaded at passenger terminals in the time passenger planes are scheduled at airports. And air freight cannot be economically accomodate itself to passenger take-off times, spaced during the day. Air-shippers must be able to move an entire shipment at one time generally late in the business day, so that delivery may be made on the following morning.

134 “Consequently, planes devoted solely to freight must be made available if the shipping public is to be adequately served.

“Flying Tiger planes can handle the large shipments of freight and can be scheduled to load at times convenient to shippers so that arrivals at destination may be made at appropriate times in the business day.

“Planes such as ours must have special equipment to handle air freight. For example, special racks must be provided for the shipment of dresses and other garments in bulk, other racks must be available for the shipment of cut flowers, refrigerants must be provided for produce and flowers, stalls must be provided for live-stock and horses, and tie-down gear must be in place to handle the varied sizes and weights of crates and packages which make up full cargoes.”

BRIEF OF FLYING TIGER LINE, INC. TO THE EXAMINERS
(pp. 33, 34).

"Recognizing this, the Flying Tigers seek merely the right to serve the airfreight shipper with the facilities the shipper requires and to deliver the shippers' product in whatever market best suits the shipper. It asks for no monopoly or special privileges. It is prepared to compete in the creation and service of new airfreight traffic and requests only that it be given equal opportunity with any other certificated carrier."

* * *

"The Flying Tiger Line, Inc. has pioneered in the new industry and has demonstrated with others that rates for airfreight can be reduced to levels which make airfreight a reality today and not fanciful talk for tomorrow. The Flying Tigers in seeking certification ask the opportunity to continue to develop their business within the framework of regulation promulgated by the Civil Aeronautics Board."

BRIEF OF THE FLYING TIGER LINE, INC. IN SUPPORT OF EXAMINER'S REPORT (pp. 13-14, 15).

"The Flying Tiger Line Inc. has assumed the capital risks in pioneering the new field of all-cargo carriage. It has financed itself without Government aid, and it has risked and is willing to risk its private funds in the development of the new public service that it offers as an airfreight carrier.

"The risks in developing the new field of air carrier service have not been underestimated. Airfreight carriage present new problems and new business risks not heretofore faced by any predecessors in the business of air transportation. Carriage of 'passengers, mail, and property' by scheduled air lines undoubtedly has its full quota of problems—financial, managerial, and operational. But these differ from those which must be mastered if airfreight carriage is to be

economically feasible. The Flying Tiger Line Inc. is prepared to meet the airfreight problems and has adequate funds of its own to expend to carry freight not heretofore carried by air by any airline.

- 135 "Recognizing this, The Flying Tiger Line seeks merely the right to serve the airfreight shipper with the facilities the shipper requires and to deliver the shipper's product in whatever market best suits the shipper. It asks for no monopoly or special privileges. It is prepared to compete in the creation and service of new airfreight traffic and requests only that it be given equal opportunity with any other certificated carrier."

ORAL ARGUMENT BEFORE THE BOARD—NORMAN L. MEYERS, COUNSEL FOR FLYING TIGER LINE INC. (p. 27836).

"Mr. Jones: It all comes right down again to the old argument that because you are devoting all your time and energies to carrying cargo freight you can go ahead and do a better job of it.

"Mr. Meyers: Not only that, but we give a better service.

"Mr. Jones: They could give the same service and some of them do, Mr. Meyers. Really it reduces down to the argument that you give a better service.

"Mr. Meyers: I will yield to that. I think we do give a better service.

"Mr. Jones: American is running more cargo planes than you are.

"Mr. Meyers: And carrying far less.

"Mr. Jones: That is true. That gets right back to your argument that you can do an all-cargo business better than the passenger lines because they are particularly interested in carrying passengers and not freight.

"Mr. Meyers: Not only that, American also says that it is using its cargo carriers to supplement the schedules of its passenger carriers and they are flying them on the same type route, with the same type of schedules, as their passenger planes.

"Mr. Jones: They have to.

"Mr. Meyers: That may very well be and for purposes of the transportation system of the country in which your emphasis is on mail and passengers and property that goes with those two types of categories, that is a proper classification. But that shouldn't exclude a different type of operation and a different classification which will generate freight that would not otherwise move."

Respectfully submitted,

GAMBRELL, HARLAN & BARWICK,
Attorneys for Eastern Air Lines, Inc.

By: G. WESLEY CHANNELL

September 24, 1951

* * * * *

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Examiner's Report

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket No. 4924 et al.

CHARTER FLIGHT TARIFF INVESTIGATION

In the matter of charter rules, regulations, rates, and charges for the air transportation of persons and baggage proposed by The Flying Tiger Line, Inc., pursuant to its Official Passenger Charter Tariff No. 2, C. A. B. No. 23, and by Resort Airlines, Inc., contained in its Special Services Tariff No. 1, C. B. B. No. 9, and its Charter Tariff No. 3, C. A. B. No. 11.

REPORT OF CURTIS C. HENDERSON, EXAMINER
Served: Feb. 19, 1952

Upon:

Norman L. Meyers, 201 Shoreham Building, Washington, D. C., for The Flying Tiger Line, Inc.

George C. Neal, 805 15th Street, N.W., Washington, D. C., for Resort Airlines, Inc.

Thomas F. Brosnan, 701 Union Trust Building, Washington, D. C., for American Airlines, Inc.

Richard S. Maurer, Municipal Airport, Memphis 2, Tenn., for Chicago and Southern Air Lines, Inc.

G. Wesley Channell, 825 Citizens and Southern Bank Building, Atlanta, Ga., for Eastern Air Lines, Inc.

George W. Bickert, 25 Broadway, New York, N. Y., for Trans World Airlines, Inc.

Floyd M. Rett, 231 So. La Salle Street, Chicago, Ill., for United Air Lines, Inc.

James Tomlinson, Bureau of Air Operations, Civil Aeronautics Board, Washington 25, D. C., Bureau Counsel.

Exceptions, if any, must be filed with the Secretary, Civil Aeronautics Board, Washington, D. C., and served upon all of the parties within 10 days from the date of service shown above. Briefs must be filed and served on all parties within 20 days after the date fixed for filing exceptions.

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UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket No. 4924 et al.
CHARTER FLIGHT TARIFF INVESTIGATION

Recommended that the Civil Aeronautics Board find that
The Flying Tiger Line, Inc., does not possess legal au-

thority under section 401 of the Civil Aeronautics Act of 1938, as amended, and Part 207 of the Economic Regulations to conduct "charter trips" carrying persons and their baggage in air transportation pursuant to section 401(f) of the Act and Part 207 of the Board's Economic Regulations.

Recommended that the Civil Aeronautics Board find that the Official Passenger Charter Tariff No. 2, C. A. B. No. 23, and the rules, regulations, and rates and charges contained therein, filed by The Flying Tiger Line, Inc., is unlawful and therefore should be rejected.

Recommended that the Civil Aeronautics Board find that Resort Airlines, Inc., does not possess legal authority within the meaning of section 401(f) of the Civil Aeronautics Act of 1938, as amended, and Part 207 of the Board's Economic Regulations to conduct the "charter trip(s)" service set forth in its Charter Tariff No. 3, C. A. B. No. 11, and any revisions and reissues thereof, and the rates, charges, rules and regulations therein, and the "special service(s)" set forth in its Special Services Tariff No. 1, C. A. B. No. 9, and any revisions and reissues thereof, and the fares, charges, rules, and regulations set forth therein, except in accordance with the public convenience and necessity which authorizes Resort Airlines to furnish air transportation only as part of an all-expense escorted tour.

Recommended that the Civil Aeronautics Board find that the Charter Tariff No. 3, C. A. B. No. 11, and any revisions, and reissues thereof, and the rates, charges, rules and regulations therein, and the Special Services Tariff No. 1, C. A. B. No. 9, and any revisions and reissues thereof, and the fares, charges, rules and regulations set forth therein, filed by Resort Airlines, Inc., are unlawful and should be rejected.

336 Appearances:

Norman L. Meyers, for the The Flying Tiger, Line, Inc.
George C. Neal, and *William H. Miranda*, for Resort Airlines, Inc.

Howard C. Westwood, *Ernest W. Jennes*, and *Thomas F. Brosnan*, for American Airlines, Inc.

E. Smythe Gambrell, *Harold L. Russell*, *Oscar M. Smith*, and *G. Wesley Channell*, for Eastern Air Lines, Inc.

Gordon W. Bickert and *George A. Spater*, (Chadbourn, Parke, Whiteside, Wolff and Brophy), for Trans World Airlines, Inc.

John T. Lorch, *Floyd M. Rett*, *Joseph A. Reilly*, and *James Francis Reilly*, for United Air Lines, Inc.

James A. Tomlinson, Bureau Counsel.

REPORT OF CURTIS C. HENDERSON, EXAMINER

This proceeding was instituted by an order of the Board dated May 25, 1951, Serial No. E-5414, instituting an investigation to determine whether the rules, regulations, rates, and charges contained in The Flying Tiger Line, Inc., Special Passenger Charter Tariff No. 2, C. A. B. No. 23,¹ are lawful.

By order of the Board dated July 17, 1951, Serial No. E-5526, an investigation was instituted to determine whether the fares, charges, rules and regulations contained in Resort Airlines, Inc.'s Special Services Tariff No. 1,

C. A. B. No. 9,² and Charter Tariff No. 3, C. A. B. 337 No. 11,³ including revisions and reissues thereof, are

¹ Flying Tiger's Official Passenger Charter Tariff No. 2, C. A. B. No. 23, proposes rules, regulations, rates and charges applicable to charter flight service for persons and baggage "between all points within the continental limits of the United States and between points outside the continental limits of the United States and from or to points within the continental limits of the United States and points outside the continental limits of the United States."

² Resort Airlines' Special Services Tariff No. 1, C. A. B. No. 9, provides for an individual round-trip fare, rules and regulations for the air transportation of passengers and their baggage between Jacksonville, Fla., and West End, Bahama Islands.

³ Resort Airlines' Charter Tariff No. 3, C. A. B. No. 11, provides for rates, charges, rules and regulations for air transportation to be performed in charter service between points in the continental United States; between points in the United States and points in its possessions; and between points in the United States and foreign points.

lawful. By that order the Board consolidated this case, Docket No. 5007, into the above-entitled proceeding, Docket No. 4924, instituted by order Serial No. E-5414.

On October 3, 1951, Resort Airlines filed a motion requesting the issuance of a recommended decision by the Examiner.

American Airlines, Inc., Eastern Air Lines, Inc., Trans World Airlines, Inc., and United Air Lines, Inc., were made parties to this proceeding. Chicago and Southern Air Lines, Inc., was granted leave to intervene. After due notice to the public and all interested parties a public hearing was held in Washington, D. C., and briefs and reply briefs to the Examiner have been filed by the parties.

In the *Air Freight Case*,⁴ The Flying Tiger Line, Inc., was granted a five-year temporary certificate of public convenience and necessity effective August 12, 1949, to engage in air transportation with respect to *property only* between various points⁵ in the continental United States.

338 The service authorized therein was made subject to terms, conditions, and limitations including a provision that The Flying Tiger Line may transport, at the expense of the shipper, one or more attendants with each shipment of live animals, live birds, and live reptiles when necessary for the protection of the shipment, other cargo, or the aircraft or its crew. Such attendant may be trans-

⁴ 10 C. A. B. 572 (1949).

⁵ 1. The terminal point Los Angeles, Calif., the intermediate points Bakersfield, Brawley-El Centro, Fresno, Long Beach, Oakland, Sacramento, Salinas-Monterey, San Diego, San Francisco, Santa Barbara, Stockton, and Thermal, Calif.;

2. The intermediate points Longview, Wash., Portland, Oreg., Seattle, Wenatchee, and Yakima, Wash.;

3. The intermediate point Minneapolis-St. Paul, Minn.;

4. The intermediate point Denver, Colo.;

5. The intermediate points Des Moines, Iowa, and Omaha, Nebr.;

6. The intermediate points Akron, Ohio, Chicago, Ill., Cleveland, Ohio, Detroit, Mich., Fort Wayne, Ind., Grand Rapids, Mich., Milwaukee, Wis., South Bend, Ind., and Toledo, Ohio;

7. The intermediate points Albany and Binghamton, N. Y., Boston, Mass., Buffalo, N. Y., Hartford, Conn., New York, N. Y., Newark, N. J., Philadelphia, Pa., Providence, R. I., and Rochester, N. Y.;

8. The intermediate point Rockland, Maine, and the terminal point Portland, Maine.

ported only when actually accompanying the shipment and may not be transported from the destination of the shipment to its origin or otherwise.

In the *Skycruise Case*,⁶ Resort Airlines, Inc., was granted a temporary five-year certificate of public convenience and necessity effective August 8, 1949, authorizing it to engage in foreign and overseas air transportation of persons and their personal baggage between numerous points.⁷

339 The certificate granted Resort states that the service therein authorized is subject to various terms, conditions and limitations, including one providing that "the holder shall offer, sell, or furnish the aforesaid transportation only as a part of an all-expense escorted tour including cost of hotel and other accommodations, meals, and local side trips; no authority is hereby granted to offer, sell, or furnish said transportation alone, and that the holder shall offer and sell only round-trip transportation and shall accept traffic for transportation only at coterminal points."

ISSUES

The issues in this proceeding may be briefly stated as follows:

1. Does The Flying Tiger, which holds a temporary certificate authorizing the transportation of property only and one or more attendants with shipments of live animals, live birds, and live reptiles, have authority to conduct

⁶ 10 C. A. B. 393 (1949).

⁷ 1. Between the coterminal points New York, N. Y.; Philadelphia, Pa.; Washington, D. C.; Pittsburgh, Pa.; Cleveland, Ohio; Detroit, Mich.; Chicago, Ill.; and Miami, Fla.; and the intermediate points Mexico City, Mexico; Guatemala City, Guatemala; Merida, Mexico; Havana, Cuba; Nassau, Bahama Islands; Ciudad Trujillo, Dominican Republic; Port-au-Prince-Cap Haitien, Haiti; San Juan, P. R.; St. Thomas and St. Croix, V. I.; St. John, Antigua; Martinique, Port-of-Spain, Trinidad; Caracas, Venezuela; Willemstad, Curacao; and Kingston-Montego Bay, Jamaica; and

2. Between the coterminal points New York, N. Y.; Philadelphia, Pa.; Washington, D. C.; Pittsburgh, Pa.; Cleveland, Ohio; Detroit, Mich.; and Chicago, Ill.; and the intermediate points Ottawa, Ontario; Montreal, St. Jovite, and Mont Joli, Quebec; Moncton, New Brunswick; Charlottetown, Prince Edward Island; St. John's, Newfoundland; Halifax and Yarmouth, Nova Scotia; and St. Johns, New Brunswick.

"charter trips and special service" for the carriage of persons and their baggage in air transportation?

2. Does Resort Airlines, which holds a temporary certificate authorizing service limited to the transportation of persons and their personal baggage only as a part of an all-expense tour, have authority to conduct "charter trips and special service" for the carriage of persons otherwise than as part of an all-expense escorted tour?

The Flying Tiger Line and Resort Airlines contend that they have authority under section 401(f) of the Civil Aeronautics Act of 1938, as amended, to conduct such "charter trips and special service," while complainants and other

parties to the proceeding contend that they do
 340 not have such authority. Therefore for the sake of clarity the contentions of all parties will be discussed in broad general terms insofar as possible under two headings, namely, "Respondents," which will include The Flying Tiger Line and Resort Airlines, and "Complainants and Other Parties," which will include American, Eastern, TWA, United, Chicago and Southern, and Bureau Counsel.

RESPONDENTS

Respondents contend that they may operate lawfully under their tariff proposals by virtue of authority granted in the last sentence of section 401(f) of the Act, which provides:

"Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the authority (Board)."

The Flying Tiger contends that the authority to perform charter trips and other special services is thus authority granted by the Congress directly by statute, authority granted to *any* air carrier engaged in *any* air transportation to engaged in *any* charter or special service business.

Resort argues that a certificated air carrier's authority to render charter service is not an authorization which is granted by, and the scope of which is defined in, the carrier's certificate, but is, on the contrary, an authority automatically given to the carrier, by force of the last sentence of section 401(f) of the Act; and that the scope of this authority is controlled by the last sentence of section 401(f),

not the certificate. Respondents contend that under
341 section 401(f) of the Act the authority to make charter trips or perform any other special service, incidental to the holding of a certificate, is not an authority which the Board grants, nor the scope of which the Board defines, in the certificate it issues, and cite *Western Air Express Corp.—Grandfather Certificate Case*,⁸ and also *Pioneer Air Lines—Amendment Case*.⁹ Applicant in the *Western Air Express Case* conducted from July 1, 1938, to August 22, 1938, scenic flights of approximately 30 minutes duration at specified hours on Saturdays and Sundays originating and terminating at West Yellowstone, Montana. The Board held such scenic services were of a type of "special service" referred to in section 401(f) for which no authorization in a certificate of public convenience and necessity was necessary. A similar conclusion was held by the Board in the *Pioneer Air Line—Amendment Case*.

Respondents point out that Part 207 of the Board's Economic Regulations defines a "charter trip" as one for the movement of either passengers or cargo, and that therefore under Part 207 The Flying Tiger Line can handle charter movement of passengers or property and that Part 207 does not attempt to require Resort to confine its charter trips and special service to all-expense tours. A summary of Respondents' contentions is that (1) the source of the authority is section 401(f), not the certificate, (2) the
442 scope of the authority is defined by section 401(f), not by the administrative discretion of the Board in

⁸ *Western Air Express Corp.—Grandfather Certificate*, 1 C. A. B. 39 (1939).

⁹ *Pioneer Air Lines—Amendment*, 7 C. A. B. 469 (1946).

framing the certificate, and (3) section 401(f) prescribes no limitations on the scope of the authority other than inherent in the meaning of the terms "charter trips" and other "special service."

In addition to the foregoing contention Resort argues that the conditions in its certificate with respect to the operation of all-expense tours were prescribed pursuant to the second proviso of the first sentence of section 401(f) of the Act which provides that "* * * and there shall be attached to the exercise of the privilege granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require." Resort therefore believes that the Board's power to prescribe the certificate terms, conditions, and limitations is expressly limited by the language of the statutory provision to terms, conditions, and limitations attached to the exercise of the privileges granted by the certificate. Resort concludes that its authorization to operate charter trips and special service is not "privileges granted by the certificate", but is an authority expressly, and automatically, granted by the last sentence of section 401(f) of the Act; and that therefore the certificate terms, conditions, and limitations do not apply to the charter and special service operated pursuant to the last sentence of that section.

Resort concedes that the service to be rendered, (i.e., the class of traffic authorized to be carried, such as passengers, property, or mail), together with the terminal and intermediate points to be served, are the two features of
 343 a certificate authorization which the Act clearly requires to be always specified in a certificate. It also concedes that the service to be rendered (the classes of traffic to be carried) and the points thus are made the basic statutory criteria for defining the scope of the authority granted by a certificate.

Resort contends that due to differences in the legal situation of Resort and The Flying Tiger Line additional factors support Resort's position. It points out that the issue

as to whether The Flying Tiger can engage in passenger charters involves the question whether The Flying Tiger's charters must conform to the basic certificate clause specifying which of the three classes of traffic may be carried on its regular service. On the other hand, Resort contends that its case does not present the question whether its charters can depart from one of these basic certificate limitations because the issue with respect to Resort is simply whether Resort's charters are controlled by incidental terms, conditions, and limitations not dealing expressly with charter service, which the Board framed and inserted in Resort's certificate.

COMPLAINANTS AND OTHERS

Complainants and others, in general, contend that The Flying Tiger Line does not have, either under the provisions of the Civil Aeronautics Act of 1938, as amended, or under its certificate, any authority to operate passenger charter service. They also contend that Resort Airlines does not possess legal authority to operate "charter trips" and "special service" except those of a character similar to the operations permissible under Resort's certificate
 344 of public convenience and necessity. To substantiate these contentions complainants and other parties submitted extensive arguments, cited the language of the applicable provisions of the Act, and numerous cases, including Interstate Commerce Commission decisions, Board decisions, and court cases, in part, as follows:

Section 401(a) of the Act specifically provides:

*"No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engaged in such transportation. * * * "* (Emphasis supplied)

In order to engage lawfully in the transportation of persons, a carrier must either obtain a certificate for the trans-

portation of persons under section 401 or must apply for and secure an exemption from the requirements of that section under section 416 of the Act. The Flying Tiger Line and Resort Airlines are air carriers and they are therefore subject to and governed by section 401(a) of the Act. Accordingly, they can engage only in such transportation as is authorized by their respective certificates of public convenience and necessity. That transportation is, as previously shown, the carriage of property (and attendants of certain shipments) by The Flying Tiger Line and the carriage of persons and their personal baggage on all-expense escorted tours by Resort Airlines.

The first sentence of section 401(f) of the Act provides as follows:

“Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require.”

345 Therefore the two basic matters required to be set forth in a certificate are (1) the points to be served, and (2) the service to be rendered. The charter provision of section 401(f) affects only one of those specifications, namely, the points to be served. The last sentence of section 401(f) of the Act provides:

“Any air carrier may make charter trips or perform any other special service, *without regard to the points named in its certificate*, under regulations prescribed by the Board.” (Emphasis supplied).

Complainants and other parties therefore contend that the last sentence of section 401(f) of the Act *provides only*

for an exception to, or an exemption from, the *route limitations* named in a carrier's certificate, and *does not provide* for exception to, or an exemption from, the *class of service* to be rendered under the certificate such as the transportation of passengers, property, or mail. Complainants point out that the first sentence of section 401(f) contains two basic requirements, namely, (1) that the points to be served must be named in the certificate and (2) the service to be rendered must also be specified, and they argue that since the last sentence of that section specifically grants an exemption from the points named in the certificate that if the Congress had intended to also grant an exemption from the service to be rendered it would have so stated in the statute.

Complainants point out that the only kind of air transportation which The Flying Tiger is permitted to perform is the carriage of property, with an incidental right
 346 to carry attendants of shipments under limited circumstances, and that the only kind of transportation which Resort Airlines may perform is the transportation of all-expense escorted tours. Complainants contend that if the Board should adopt an interpretation of the charter provisions of section 401(f) of the Act in accordance with the views of The Flying Tiger Line and Resort Airlines it would mean that each time a new carrier is certificated such carrier would have charter and special service authority unrestricted as to the class of air transportation it could perform, thus considerably enlarging its basic authority if it had been authorized to engaged in any type of special service such as the carriage of property only or the rendition of escorted all-expense tours. It would mean that despite findings of the Board that the public convenience and necessity required only the certification of all-cargo service, it unwittingly created a whole group of new passenger charter as well as cargo charter operators by its decision in the *Air Freight Case, supra*. It would mean that notwithstanding its authorization to Resort Airlines to

operate only all-expense escorted tours, the Board created another cargo charter operator as well as a passenger charter operator. It would also mean that when, and if, the Board certificated helicopter operators to engage in the transportation of mail only, it would create another group of air carriers which can go out and buy fixed wing equipment and engaged in cargo and passenger charter services. Complainants point out that under any such interpretation of section 401(f) there would be no limit to the

347 passenger charter operators or cargo charter operators, notwithstanding the fact that particular carriers were brought into existence to serve a single class of traffic. They therefore conclude that the result would be the superimposition of numerous charter and special service operations upon the certificate route network and the eventual destruction of an orderly and economic air transportation system. They therefore urge that the proposed tariffs of The Flying Tiger Line and Resort should be rejected as illegal.

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CONCLUSIONS

As stated, the principal basic issues presented herein are (1) whether The Flying Tiger Line, which is certificated to carry property, is authorized under section 401(f) of the Act to make charter trips or perform any other special service carrying passengers, and (2) whether Resort Airlines, which is certificated to carry passengers and their personal baggage on all-expense escorted tours, is authorized under section 401(f) of the Act to make charter trips or perform any other special service carrying passengers who are not on all-expense escorted tours.

Section 401 requires that no air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation. Other than complying with this section of the Act and obtaining a certificate of public convenience and necessity, an air carrier must apply for and

secure an exemption under section 416(b) of the Act from the requirements of section 401 in order to engage lawfully in the transportation of persons. By stating it another way, if an air carrier does not apply for and secure an exemption under section 416(b) of the Act from the requirements of section 401, then it is mandatory that such air carrier comply with the certificate requirements of section 401 of the Act before it can engage lawfully in the transportation of passengers.

The Flying Tiger Line has not complied with the certificate requirements of section 401 of the Act in respect to the transportation of passengers. Resort Airlines, however, has complied with the certificate requirements of section 401 in respect to the transportation of passengers and their baggage subject to certain terms, conditions, and limitations providing that such transportation shall be furnished only as a part of an all-expense escorted tour and that no authority is granted to furnish such transportation alone.

Section 401(d) provides that the Board may issue a certificate authorizing the whole or any part of the transportation covered by the application if it finds that the applicant is fit, willing, and able to perform such transportation properly and to conform to the provisions of the Act and the rules, regulations, and requirements of the Board, and that such transportation is required by the public convenience and necessity.

Although the majority of the certificated airlines have been authorized by the Board to carry passengers, property, and mail, there is no reason why the Board cannot under Title IV of the Act grant the whole or any part of an application and restrict the service authorized in the certificate to the transportation of a special commodity or a limited class of passengers.

Under the provisions of sections 206 and 207 of the Interstate Commerce Act the Interstate Commerce Commission has issued numerous certificates to motor common car-

riers authorizing the transportation of special commodities such as oil field equipment, packing house products, or beer. It has also issued a considerable number of certificates authorizing "special service" in respect to the transportation of passengers.¹⁰

350 If the Board has the power to issue a certificate authorizing the transportation of property only, as it did in the *Air Freight Case*, *supra*, then it also has the power to issue a certificate authorizing the transportation of a special commodity such as dresses or lettuce. By the same token, if the Board has the power to issue a certificate authorizing the transportation of passengers only, then it has the power to issue a certificate authorizing the transportation of a certain class of passengers or of passengers with certain terms, conditions, and limitations attached to the certificate in respect to the transportation of passengers and limiting the service such as it did in case of Resort.

The Flying Tiger and Resort, in effect, argue that they have a form of dual authority, i.e., authority to operate in accordance with the scope of their respective certificates and also authority, by operation of law granted by the Congress under the provisions of the last sentence of section 401(f) of the Act, to make charter trips or perform any other special service in the transportation of passengers or property, without limitation. From a casual reading of the last sentence of section 401(f) of the Act, one reasonably may conclude that there is some merit to respondents' contention. However, it is an elementary rule of statutory construction that effect must be given, if possible, to every word, clause, and section of the statute.¹¹ If the last sentence of section 401(f) is read in conjunction with the first sentence of that section, which must be done to obtain the correct meaning of the statute, it is obvious that the Con-

¹⁰ *Red Star Sightseeing Line, Inc., Common Carrier Application*, 1 M. C. C. 521; *Smoky Mountain Tours Company, Common Carrier Application*, 10 M. C. C. 127; and *Gray Line, Inc., Common Carrier Application*, 32 M. C. C. 129.

¹¹ 2 Sutherland Statutory Construction (3rd Ed.), section 4705.

gress did not intend to create an anomalous situation
 351 where a certificated carrier, in effect, would be able to render two separate and distinct types or classes of service, i.e., (a) the class of service authorized by the Board and specified in its certificate, which might be very limited, and (b) unlimited types of charter or special service to any place by operation of law under the last sentence of section 401(f) of the Act. The fallacy of respondent's contention can be illustrated by taking a hypothetical case and omitting the economic consideration which is present in all cases and reducing the service to be rendered to the lowest possible denomination. For example, suppose the Board should issue a certificate of public convenience and necessity to an air carrier authorizing the transportation of diamonds between Baltimore, Md., and Washington, D. C., which it undoubtedly would have power to do under section 401(d) of the Act. Then, if the Board should follow the construction placed on section 401(f) of the Act by respondents, the carrier of diamonds between Baltimore and Washington could make charter trips or perform any other special service in respect to the transportation of passengers and all classes of property and mail to any place. Clearly, it was not the intention of the Congress that the last sentence of section 401(f) be construed so as to permit the holder of a certificate authorizing such a limited service to enlarge that service to the extent set forth above. If a carrier of diamonds cannot enlarge the services specified in its certificate under the provisions of the last sentence of section 401(f) to the extent of making charter trips or performing any other special service in respect to the transportation of passengers, mail, and the thousands of different classes of property, then no other air carrier, including respondents, has a legal right to do so.

352 The first sentence of section 401(f) expressly requires (1) that each certificate shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transporta-

tion, and (2) the service to be rendered. It is well established that the service to be rendered means the class of traffic to be carried, i.e., passengers, property, or mail, or a combination of all of them. The first sentence of section 401(f) also provides that there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require.

The charter provisions of the last sentence of section 401(f) provide an exception to, or an exemption from, only one of those mandatory specifications, namely, the points to be served. It provides that any air carrier may make charter trips or perform any other special services, *without regard to the points named in its certificate*, under regulations prescribed by the Board. It simply means that an air carrier making charter trips or performing any other special service may do so without complying with the route requirements as specified in its certificate. The final sentence of section 401(f) makes no reference whatsoever to the other major and mandatory specification of each certificate, namely, *the service to be rendered*. Therefore, the omission from the last sentence of section 401(f) of the Act by an exception to, or an exemption from, the service requirement of each certificate can have no other meaning than it was the intention of the Congress that the holder of a certificate should be bound by the service specifications of

353 its certificate in all of its operations, including charter trips or any other special service. To hold otherwise would mean that to a large extent the broad powers entrusted to the Board under the declaration of policy contained in section 2 of the Act would become meaningless. Under the declaration of policy, the Board is charged with the responsibility of promoting adequate air transportation service, fostering sound economic conditions in the industry, and the encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce

of the United States, of the Postal Service, and of the national defense. The principal instrumentality through which these obligations are to be accomplished is a certificate of public convenience and necessity.

It is conceded that the last sentence of section 401(f) provides an exception to, or an exemption from, the point specifications required to be set forth in all certificates, but it is clear that it authorizes no departure from the service limitations or specifications in the case of charter or special service. If the Congress had intended for air carriers to depart from the service specification of their certificates when making charter trips or performing any other special service, it could easily have provided for them to do so by adding only six words to the last sentence of section 401(f), as follows: Any air carrier may make charter trips or perform any other special service, without regard to (the service to be rendered or) the points named in its certificate, under regulations prescribed by the Board." The fact remains that the Congress failed to specifically make such an exception to, or exemption from, the service require-

ments of section 401(f) of the Act, and under any
 354 reasonable construction of that section of the Act it is clear that any air carrier holding a certificate of public convenience and necessity is bound by the service specifications and limitations of its certificate while performing any air transportation, including charter trips or any other special service. In view of the foregoing conclusions and all the facts of record, it is found that The Flying Tiger Line and Resort Airlines may make charter trips or perform any other special service only in respect to the same type or class of service specified in their respective certificates.

Resort points out that the conditions and limitations in its certificate with respect to the operation of all-expense tours were prescribed pursuant to the second proviso contained in the first sentence of section 401(f) of the Act. Resort therefore contends that the Board's power to prescribe

in the certificate such reasonable terms, conditions, and limitations as the public interest may require is expressly limited by the language of the statutory provision to terms, conditions, and limitations attached to the exercise of the privileges granted by the certificate. This contention is without merit. The second proviso of the first sentence of section 401(f) as it appears in the statute is as follows:

“* * * and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require.”

It is therefore apparent that the only limitations on the powers of the Board under the second proviso of the first sentence of section 401(f) is that the terms, conditions, and limitations attached to the exercise of the privileges granted by a certificate must be *reasonable* and *as the public interest may require*. There is nothing in the instant proceeding to indicate that the terms, conditions, and limitations attached to the exercise of the privileges granted by Resort's certificate are unreasonable. In addition, that is not an issue in this case. The Board found in the *Skycruise Case, supra*, that such conditions and limitations were directed by the President and therefore required by the public interest.

Bureau Counsel and certain complainants contend (a) that the Interstate Commerce Commission in several cases cited has held that the incidental right to operate special or charter operations under section 208(c) of the Interstate Commerce Act does not attach to motor common carrier certificates issued under the proviso of section 207(a) of that Act authorizing a carrier to engage exclusively in either special or charter operations, or both, for the transportation of passengers and their baggage over irregular routes; (b) that in many respects the Civil Aeronautics Act was patterned after the Motor Carrier Act, the terms and provisions of both Acts are similar, and that because of this similarity the charter provisions of section 401(f) of

the Civil Aeronautics Act and section 208(c) of the Interstate Commerce Act should be given like interpretation; (c) that Resort's certificate authorizes special service; and (d) that on this ground the Board should hold that the last sentence of section 401(f) of the Act does not grant Resort any incidental or dependent rights to engage in charter trips or any other special service.

Bureau Counsel and certain complainants are correct in their contention that Resort is certificated to render a form of special service, but they are in error in their conclusion that such a carrier has no right under the last sentence of section 401(f) of the Act to make charter trips or
 356 perform any other special service because of the construction placed on the proviso to section 207(a) of the Interstate Commerce Act by the Interstate Commerce Commission. The proviso to section 207(a) is far more restrictive than the last sentence of section 401(f) of the Act. The proviso to section 207(a) requires carriers who are engaged or propose to engage exclusively in the transportation of special or chartered parties *over irregular routes* to obtain a certificate specifically authorizing such operations, while section 401(f) permits *any air carrier* to make charter trips or perform any other special services. Resort is an air carrier and, regardless of whether its operations may be classified as special services or not, it can make charter trips or perform any other special service without regard to the points named in its certificate, under regulations prescribed by the Board, so long as the service rendered does not exceed the service authorized and specified in its certificate. This finding also applies to The Flying Tiger. These are the legal rights of the respondents, and this construction of the statute should not be construed to mean that they could make such restricted charter trips and perform any other special service on an economical basis.

Section 208(c) of the Interstate Commerce Act provides:

“Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce *to any place* special or chartered parties under such rules and regulations as the commission shall have prescribed.” (Emphasis supplied.)

The proviso to section 207(a) of the Interstate Commerce Act provides:

“That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, *except as such carrier may be authorized to engage in special or charter operations.*” (Emphasis supplied.)

357 The Interstate Commerce Commission held in the *Peninsula Transit Corporation Case*¹² that the right of a motor common carrier under section 208(c) of the Interstate Commerce Act to conduct special or chartered parties is incidental to the holding of a certificate for the transportation of passengers between fixed termini over a regular route or routes, and as to such holder neither the right to conduct such operations nor the scope thereof need be stated in the certificate.

This is similar to the holding of the Board in the *Western Air Express Corp. Case*, *supra*, and the *Pioneer Air Lines Case*, *supra*, where it stated that certain service under consideration was a type of “special service” referred to in section 401(f) of the Act and for which no authorization in the certificate of public convenience and necessity is necessary. It should be pointed out that the motor carrier in the *Peninsula Transit Case* was one whose certificate authorized the transportation of *passengers over a regular route or routes, and between fixed termini*, while the air carriers

¹² *Peninsula Transit Corp., Common Carrier Application*, 1 M. C. C. 440.

in the *Western Air Express Case* and the *Pioneer Air Lines Case* were certificated to carry *passengers, property, and mail*. The Interstate Commerce Commission and the Board, in effect, stated that it was not necessary for these carriers to submit proof of a need for such charter or special service or for such authorizations to be set forth in their certificates.

The Commission held in the *Red Star Sightseeing Lines Case, supra*, that the right to conduct special or chartered parties is incidental only to the holding of a certificate for the transportation of passengers *between fixed termini and over a regular route or routes*. The Commission

358 further held that only those common carriers of passengers who are engaged or propose to engage exclusively in the transportation of special or charter parties *over irregular routes*, under the proviso of section 207(a) of the Act, are required to obtain a certificate specifically authorizing such operations, and that such a certificate would not carry with it any right to transport to any place special or chartered parties under section 208(c) of the Act. The Commission held that the proposed sightseeing and pleasure-tour operations of applicant which would be conducted *over irregular routes* are special operations within the meaning of the proviso to section 207(a) of the Act.¹³

There is one distinction between the provision of section 208(c) of the Interstate Commerce Act and the provisions of the last sentence of section 401(f) of the Act. That distinction is that a motor common carrier authorized to transport passengers between fixed termini and over a regular route or routes may carry special or chartered parties from any points on its route or routes to any place, while any air carrier holding a certificate authorizing the transportation of passengers, property, and mail between terminal points and intermediate points, if any, may make charter

¹³ See *Gray Line, Inc., supra*; *Smoky Mountain Tours Company, supra*; *Lockridge Common Carrier Application*, 7 M. C. C. 601; *O. Granville Grinage, Common Carrier Application*, 16 M. C. C. 259; and *Sullivan County Highway, Inc. Common Carrier Application*, 21 M. C. C. 717.

trips or perform any other special service from any point to any other points, under regulations prescribed by the Board.

On the basis of the foregoing findings and conclusions and all the evidence of record, it is recommended that the Board find:

359 1. That The Flying Tiger Line, Inc., does not possess legal authority, under section 401 of the Civil Aeronautics Act of 1938, as amended, and Part 207 of the Economic Regulations, to conduct "charter trips" carrying persons and their baggage in air transportation pursuant to section 401(f) of the Act and Part 207 of the Board's Economic Regulations;

2. That the Official Passenger Charter Tariff No. 2, C. A. B. No. 23, and the rules, regulations, and rates and charges contained therein, filed by The Flying Tiger Line, Inc., is unlawful and therefore should be rejected;

3. That Resort Airlines, Inc., does not possess legal authority, within the meaning of section 401(f) of the Civil Aeronautics Act of 1938, as amended, and Part 207 of the Board's Economic Regulations, to conduct the "charter trip(s)" service set forth in its Charter Tariff No. 3, C. A. B. No. 11, and any revisions and reissues thereof, and the rates, charges, rules, and regulations therein, and the "special service(s)" set forth in its Special Services Tariff No. 1, C. A. B. No. 9, and any revisions and reissues thereof, and the fares, charges, rules, and regulations set forth therein, except in accordance with the public convenience and necessity which authorizes Resort Airlines to furnish air transportation only as part of an all-expense escorted tour; and

4. That the Charter Tariff No. 3, C. A. B. No. 11, and any revisions and reissues thereof, and the rates, charges, rules, and regulations therein and the Special Services Tariff No. 1, C. A. B. No. 9, and any revisions and reissues thereof,

and the fares, charges, rules, and regulations set forth therein, filed by Resort Airlines, Inc., are unlawful and should be rejected.

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BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket No. 4924, et al.
In the Matter of Charter Flight
Tariff Investigation of
THE FLYING TIGER LINE, INC.
Official Passenger Charter Tariff No. 2, C. A. B. No. 23

**Flying Tiger Line, Inc., Exceptions to the
Examiner's Report**

The report of Curtis C. Henderson, Examiner, in this proceeding was served on February 19, 1952. The Flying Tiger Line, Inc., takes general exception to the conclusions stated and the reasons given therefor on the ground that they are based upon a misconstruction of the statutory provisions pertaining to charter flights and other special services by air. The Flying Tiger Line, Inc., takes specific exceptions to the following conclusions in the Examiner's Report:

1. Exception is taken to the statement that the principle basic issue is "whether the Flying Tiger Line, Inc., which is certificated to carry property is authorized under Section 401-F of the Act to make charter trips or perform any other special service carrying passengers" (p. 14).

Section 401-F of the Act authorizes any carrier to make charter trips or perform any other special service.
367 The charter and special provision in itself makes no reference to passengers.

2. Exception is taken to the statement that "it is mandatory that such air carrier comply with the certificate requirements of section 401 of the Act before it can engage

lawfully in the transportation of passengers. The Flying Tiger Line has not complied with the certificate requirements of section 401 of the Act in respect to the transportation of passengers." (p. 14).

The Flying Tiger Line, Inc., has complied with the certificate requirements of section 401 of the Act; it is not required to comply "in respect to the transportation of passengers" in order to engage in charter or special services to include passengers.

3. Exception is taken to the statement that the Board "also has the power to issue a certificate authorizing the transportation of a special commodity such as dresses or lettuce" (p. 16), on the ground that this is not an issue and is immaterial and irrelevant.

4. Exception is taken to the statement that "it is obvious that the Congress did not intend to create an anomalous situation where a certificated carrier, in effect, would be able to render two separate and distinct types or classes of service, i.e., (a) the class of service authorized by the Board and specified in its certificate, which might be very limited, and (b) unlimited types of charter or special service to any place by operation of law under the last sentence of section 401-F of the Act." (pp. 16-17).

The Congress provided for transportation to be specified in a certificate and also made statutory provision for charter or special services to be performed by a certificate holder under authority of the statute rather than the certificate.

368 5. The Examiner poses an illustration of a carrier certificated to transport diamonds between Baltimore, Md., and Washington, D. C., and raises the question whether such a carrier could make charter trips or perform special services in respect to passengers and to the classes of property and mail and concludes that "clearly, it was not the intention of the Congress that the last sentence of section 401-F be construed so as to permit the holder of a certificate authorizing such a limited service to enlarge that service to the extent set forth above." (p. 17).

Exception is taken to this interpretation of the statute. If the Board could find it possible to issue a certificate to a carrier under the stated conditions, that carrier would still have the rights accorded to all certificate holding carriers by the statutory provisions of the Congress. The statutory provision is not to enlarge "the certificated service" but to authorize additional or supplemental service.

6. Exception is taken to the statement that "the charter provisions of the last sentence of section 401-F provide an exception to, or an exemption from, only one of those mandatory specifications, namely, the points to be served"; and the explanatory sentences which follow it on page 18.

In the statutory sentences in question a phrase "without regard to the points named in its certificate" are not part of the main clause of the sentence and do not have the same meaning given to the clause by the Examiner. Contrary to the Examiner's interpretation, the sentence in question does not make reference to the two mandatory specifications of a certificate; namely, the service to be rendered and the points to be served.

7. Exception is taken of the statement made by the Examiner that "to hold otherwise would mean that to
369 a large extent the broad powers entrusted to the Board under the declaration of policy contained in section 2 of the Act would become meaningless." (p. 19).

To give full meaning to section 2 of the Act a correct construction of the charter and special service provision is that presented by the Flying Tiger Line Inc.

8. Exception is taken to the statement that the Congress failed to specifically make an exception to or exemption from the service requirements of 401-F of the Act as it could have done by adding the phrase "the service to be rendered or" so as to make the last sentence of 401-F read "Any air carrier may make charter trips or perform any other special service, without regard to (the service to be rendered or) the points named in its certificate, under regulations prescribed by the Board". (p. 19).

The Congress in authorizing any air carrier "to make charter trips or perform any other special service" in fact did not use such a phrase; such a phrase would be redundant, even meaningless.

9. Exception is taken to the statement "In view of the foregoing conclusions and all the facts of record, it is found that the Flying Tiger Line and Resort Airlines may make charter trips or perform any other special service only in respect to the same type or class of service specified in their respective certificates." (p. 20).

Such a finding can be made only upon a construction of a statute, which in effect is a re-writing of the statute. It is not supported by the statute as written.

10. Exception is taken to the recommendation that the Board find "that The Flying Tiger Line Inc. does
370 not possess legal authority, under section 401 of the Civil Aeronautics Act of 1938, as amended, and Part 207 of the Economic Regulations, to conduct 'charter trips' carrying persons and their baggage in air transportation pursuant to section 401-F of the Act and Part 207 of the Board's Economic Regulations." (p. 25).

A contrary finding is required by the last sentence of section 401-F of the Act.

11. Exception is taken to the recommendation that the Board find "that the Official Passenger Charter Tariff No. 2, C. A. B. No. 23, and the rules, regulations, and rates and charges contained therein, filed by The Flying Tiger Line, Inc., is unlawful and therefore should be rejected." (p. 25).

A contrary finding is required by the last sentence of section 401-F of the Act.

Respectfully submitted,

THE FLYING TIGER LINE, INC.

/s/ NORMAN L. MEYERS

Norman L. Meyers

Counsel

* * * * *

Opinion

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

(Served: June 23, 1952)

Docket No. 4924 *et al.*¹

CHARTER FLIGHT TARIFF INVESTIGATION

Decided: June 20, 1952

Official Passenger Charter Tariff No. 2, C. A. B. No. 23, filed by The Flying Tiger Line, Inc., an air carrier certificated to carry property only, found unlawful and directed to be cancelled, because the air carrier does not have legal authority under section 401 of the Civil Aeronautics Act of 1938, as amended, to engage in air transportation carrying persons and their baggage on charter trips.

Charter Tariff No. 3, C. A. B. No. 11, filed by Resort Airlines, Inc., found not unlawfully to provide for air transportation of persons and baggage on charter trips other than as part of the escorted all-expense tours for which it is certificated, in that the air carrier has legal authority under the terms of its certificate to engage in such chartered air transportation.

Special Services Tariff No. 1, C. A. B. No. 9, filed by Resort Airlines, Inc., for the round-trip air transportation of persons and baggage from Jacksonville, Florida to West End, Bahama Islands, and return, offered individually and not as part of an escorted all-expense tour, found unlawful and directed to be cancelled because such transportation is not a special service.

¹ By Order Serial No. E-5526, dated July 17, 1951, the Board instituted an investigation, Docket No. 5007, of the legality of Resort Airlines, Inc.'s Special Service Tariff No. 1, C. A. B. No. 9, and Charter Tariff No. 3, C. A. B. No. 11, and consolidated it into the investigation in Docket No. 4924 of the legality of The Flying Tiger Line, Inc.'s Official Passenger Charter Tariff No. 2, C. A. B. No. 23, instituted by Order Serial No. E-5414, dated May 25, 1951.

Appearances:

Norman L. Meyers, for the Flying Tiger Line, Inc.

George C. Neal, and *William H. Miranda*, for Resort Airlines, Inc.

Clifton J. Stratton, *Howard C. Westwood*, *Ernest W. Jennes*, and *Thomas F. Brosnan*, for American Airlines, Inc.

573 *E. Smythe Gambrell*, *Harold L. Russell*, *Oscar M. Smith*, and *G. Wesley Channell*, for Eastern Air Lines, Inc.

Gordon W. Bickert and *George A. Spater*, (Chadbourn, Parke, Whiteside, Wolff and Brophy) for Trans World Airlines, Inc.

John T. Lorch, *Floyd M. Rett*, *Joseph A. Reilly*, and *James Francis Reilly*, for United Air Lines, Inc.

James A. Tomlinson, Bureau Counsel.

OPINION

BY THE BOARD:

The Board instituted this investigation,² after complaints had been filed by certain air carriers,³ to determine the legality of a charter tariff for air transportation of passengers and their baggage filed by The Flying Tiger Line, Inc. (Tigers), and of a charter tariff and a special service tariff for the air transportation of passengers and their baggage filed by Resort Airlines, Inc. (Resort). Tigers is certificated as a property-only air carrier. Resort's certificate authorizes air transportation of persons, subject to a limitation that they shall be carried only as a part of all-expense, escorted tours. Resort's tariffs here in issue provide for transportation other than as a part of such tours. Both Tigers and Resort claim legal authority to carry passengers as proposed in the tariffs under investigation by reason of section 401(f) of the Act, which provides that any air carrier may make charter trips or perform any other special service without regard to the points named in its certificate under regulations prescribed by the

574 Board. It is the interpretation of this provision with which this proceeding is largely concerned.

After due notice, a public hearing was held before Examiner Curtis C. Henderson, who has issued his report. In it he found that Tigers has authority to engage in charter trips and special services only for the carriage of property and Resort has charter and special service authority only for the transportation of passengers and their baggage as a part of escorted, all-expense tours, and accordingly that all three of the tariffs in issue were unlawful, because the respective carriers were not authorized to engage in the air transportation covered by such tariffs.

Tigers and Resort excepted generally and in detail to the Examiner's Report and have filed briefs to the Board

² See note 1, *supra*.

³ Trans World Airlines, Inc. (TWA), American Airlines, Inc. (American), Eastern Air Lines, Inc. (Eastern), and United Air Lines, Inc. (United), parties hereto.

in support of their exceptions. Eastern, United and Bureau Counsel excepted to the Examiner's Report insofar as it found Resort does have charter and special service authority to transport passengers if carried as a part of all-expense escorted tours. Bureau Counsel also excepts to the Examiner's failure to find that Resort's special service tariff is unlawful in that the round-trip feature of the transportation proposed therein is insufficient to make it a special service. United and Bureau Counsel have filed briefs to the Board in support of their positions, and Eastern has requested the Board to consider the briefs it filed to the Examiner. American excepted to the Examiner's failure to recommend disapproval of those provisions in Resort's charter tariff which would base charges for charter flights on per-passenger rates, and has requested the Board to consider its brief to the Examiner. The Board has heard oral argument, and the case stands submitted for decision.

Upon consideration of the record, we adopt, with the modifications herein set forth, the findings, conclusions and recommendations of the Examiner in his report, which is attached hereto. We have reached conclusions different from those of the Examiner principally with respect to the effect upon Resort's charter and special service authority of the all-expense escorted tour provisions in Resort's certificate. We have determined that Resort's charter and special service authority is not affected by those provisions of Resort's certificate. We also have determined that Resort's special service tariff for individual passenger round trips from Jacksonville, Florida, to West End, Bahama Islands, and return is unlawful in that it does not amount to a special service.⁴

We agree with the Examiner's basic conclusion that the authority of a certificated air carrier to make charter trips and perform special services conferred by the last sentence

⁴ The Examiner did not state any conclusion on this point, since he found, as we do not, that the tariff is otherwise unlawful in failing to embody the all-expense escorted tour feature and therefore beyond what he concluded was the scope of Resort's special service authority.

of section 401(f)⁵ is unrestricted as to points served, but is limited to the class of service specified in the carrier's certificate. The analysis in his report which supports this conclusion need not be repeated here. Certain contentions advanced to support exceptions to his report will, however, be discussed.

576 Resort and Tigers in support of their view say that the terms "charter" and "special service" comprehend the carriage of persons as well as property, and that therefore a legislative grant of authority for charter trips is a grant of authority to render passenger service on charter flights.

This contention is not persuasive. The terms "charter trips" and "other special services" clearly have relation to the conditions under which the carriage is performed, not the class of traffic carried. Of course, Congress used terms which comprehended the carriage of passengers under such special conditions, since those who had certificate authority to carry passengers were intended to be authorized to carry them on charter trips or other special services, but it did not thereby confer the authority to carry passengers where no such authority otherwise existed. Congress must be taken to have used "charter trip" with the intention of signifying its usual and ordinary connotation, which is merely a flight involving a contract for the entire capacity of the aircraft, without any implication in the term itself as to whether the uses to which such capacity may be put are or are not unlimited. There is nothing in the word "charter," therefore, or in the term "special service," which is at variance with the reasoning underlying the conclusion here reached.

⁵ Section 401(f) in pertinent part provides:

"Each certificate issued under this section shall specify the terminal and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require . . . Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the (Board)."

Tigers contends that the phrase "any other special service" in the last sentence of section 401(f) is to be read in conjunction with "service to be rendered" which the Board is required by the first sentence of section 401(f) to specify in the certificate. Tigers urges that the two phrases form a dichotomy and that "special services" mean all services other than those prescribed in the certificate. If this contention were accepted, it would mean that Tigers, which is certificated by the Board to render property service only, is authorized by the Act to render passenger

577 service, such service being, as to it, a "special," i.e., noncertificated, one. It would also mean that a certificated non-mail air carrier is similarly authorized to transport mail. It would make the content of the term "special service" vary from carrier to carrier in inverse proportion to the type of service for which the carrier was certificated. It would also seem to mean that the carrier certificated to carry passengers, property and mail was precluded from any "special service." In the light of these consequences, we cannot accept as reasonable an interpretation of "special service" as meaning all services other than those prescribed in a particular certificate. It is not necessary here to define the phrase in all of its possible applications, since it is at least clear that special services includes services provided under conditions and terms of carriage which are of a significantly distinctive nature. Thus construed, the phrase "special services" is entirely consistent with the conclusion that such services may be performed without regard to a certificate's route authorizations, as the statute provides, but not free from the certificate's authorization as to class of traffic to be carried, from which no such exception is made by the Act.

Tigers contends that the legislative history of the Act shows that it was intended to grant authority to a certificated carrier to engage in charter operations carrying all classes of traffic. We find nothing in the legislative history, and Tigers has cited nothing, which justifies this view.

Tigers' explanation of how and why an express exception was provided from the authorization of a certificate as to points to be served is no warrant for reading into the Act an implied exception from the companion service limitations, and indeed, it tends to show the contrary. As previously noted, the bare words "charter trips" and 578 "special service" imply nothing as to what may be carried. Similarly, these terms by themselves also imply nothing as to where whatever is being carried may be taken. Therefore, it would be just as reasonable to interpret these terms, standing alone, as meaning a right to go anywhere as a right to carry any traffic. Nevertheless, Congress, which obviously intended charter and special service operations to be geographically unrestricted, thought it necessary to say so. If Congress had also intended these operations to be unrestricted as to the class of traffic to be carried, despite the certificate authorization, it is hard to believe that a similar express statement would have been thought unnecessary, since the terms are as neutral in the one respect as in the other, and since both the geographical and the service specifications stem from a single sentence in the same subsection as that containing the charter trip provisions.

We have considered the remaining contentions of respondents in support of their view that the authority granted by the Act for charter and special service operations is not restricted to the class of service specified in the certificate, and find them without merit.

It is important to note that this decision does not prevent Tigers or other certificated cargo-only carriers from obtaining exemptions under section 416(b) of the Act, in accordance with the standards thereof, to permit the continuation of military charter or other special service operations carrying passengers as well as property, where considerations of national interest will be served thereby.

In applying to Resort the basic conclusion that charter and special service authority is subject to the service speci-

fications of the certificate, the Examiner determined that

579 Resort's certificate authorized it to render only the following class of service, *viz.*, transporting such passengers as are carried as a part of all-expense escorted tours, and that consequently it is only this class of traffic-tour passengers—which Resort may carry on charter and special service flights under the last sentence of section 401(f). Resort contends that under its certificate it has basic authority to provide service to passengers as such, and that the provisions in its certificate that passengers may only be carried on escorted all-expense tours do not apply to its charter and special service operations. We agree with this contention, but it is important to note that we do so because of the language of Resort's certificate and not because of the wording of section 401(f), which Resort also urges in support of its contention. That section directs the Board, in issuing a certificate, to see to it that "... there shall be attached to the exercise of the privileges granted by the certificate . . . such reasonable terms, conditions, and limitations as the public interest may require," and it was acting under these words that the Board inserted the all-expense escorted tour limitation in Resort's certificate. Resort says that under the quoted language the Board is authorized to attach limitations only to the exercise of privileges granted by the certificate, and that since charter and special service authority is granted by the Act, not by the certificate, such authority cannot be subjected to these limitations.

We think Resort has misinterpreted the quoted language. The only statutory criteria for such "terms, conditions, and limitations" is that they be "reasonable" and "as the public interest may require." As for the provision that they shall be "attached" to the exercise of the privileges granted by the certificate, this does not mean that they
 580 shall be "applied" solely to the exercise of those privileges, but rather that they shall be affixed or linked to the exercise of those privileges as a requirement

upon whose continued observance in all its stated applications the continued exercise of the certificated privilege depends. Therefore, the Board did have the power, in framing Resort's certificate, to attach to the exercise of Resort's certificated privileges an all-expense limitation applicable both to certificated and to charter and special service operations. This, however, the Board did not do, as an examination of the pertinent language of Resort's certificate reveals,⁶ and accordingly Resort's rights for charter and special service operations encompass passenger service generally.

Eastern, United, and Bureau Counsel contend that the last sentence of section 401(f) does not empower Resort to engage in any charter and special service operations whatsoever, arguing that since Resort was certificated only to provide what are in effect special services, its special service authority (including charter authority) is only that which is set forth in its certificate. We have considered the grounds in support of this contention and have concluded that they are without merit, both for the reasons set forth in the Examiner's Report and because the Act plainly grants charter and special service authority to "any" certificated air carrier and creates no classification of special service air carriers who are excluded from this grant.

Bureau Counsel excepts to the Examiner's failure to find that Resort's tariff for the round-trip air transportation of individual passengers and baggage from Jacksonville,

⁶ Resort's certificate in pertinent part reads:

"RESORT AIRLINES, INC., is hereby authorized . . . to engage in foreign and overseas air transportation with respect to *persons and their personal baggage*, as follows:

1. Between the coterminal points . . . and the intermediate points . . . ; and
2. Between the coterminal points . . . and the intermediate points . . .

"*The service herein authorized is subject to the following terms, conditions, and limitations:*

(1) The holder shall offer, sell, or furnish the *aforesaid* transportation only as a part of an all-expense escorted tour including cost of hotel and other accommodations, meals, and local side-trips; no authority is *hereby granted* to offer, sell, or furnish *said transportation* alone.

* * * * *

Florida, to West End, Bahama Islands, and return, filed by Resort as a special service tariff, is unlawful in that it fails to describe a special service. This tariff is, of course, not authorized by Resort's certificate, since it is outside the all-expense escorted tour limitation, and must stand or fall as a special service. The only feature which might be advanced as qualifying it as a special service is that it offers transportation only on a round-trip basis. This feature, without more, is not sufficient to clothe the service with such a distinctiveness as would differentiate it to a significant extent from ordinary services in air transportation. For while it is true that ordinarily passengers in air transportation may purchase either one-way or round-trip tickets between a given pair of points, it is a matter of common knowledge that a very substantial proportion of ordinary passenger service is sold on a round-trip basis. A service whose claim to distinction is a feature common to so major a portion of everyday air transportation is not a special service. An opposite conclusion would open
 582 the doors for any air carrier certificated to render passenger service on a fixed route, however limited, to engage, subject to regulation, in individual passenger service anywhere on a round-trip basis as a matter of right.

American contends that the Examiner erred in failing to find that Resort's charter tariff is unlawful insofar as it contains rates for charter trips on a per-passenger basis. The Examiner's Report does not discuss the issue of per-passenger charter trip rates. Since Resort no longer has on file with the Board any charter tariff containing such rates, this issue has become moot and need not be decided herein.

An appropriate order will be entered.

Nyrop, *Chairman*, Ryan, Lee, Adams, and Gurney, Members of the Board, concurred in the above opinion.

* * * * *

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 20th day of June, 1952.

Docket No. 4924 *et al.*

In the Matter of Charter Rules, Regulations, and Charges
for the air transportation of persons and baggage pro-
posed by the FLYING TIGER LINES, INC., pursuant to
its Official Passenger Charter Tariff No. 2, C. A. B. No.
23, and by RESORT AIRLINES, INC., contained in its Spe-
cial Service Tariff No. 1, C. A. B. No. 9, and its Charter
Tariff No. 3, C. A. B. No. 11.

Order

A full public hearing having been held in the above-en-
titled proceeding and the Board, upon consideration of the
record, having issued its opinion containing its findings,
conclusions and decisions, which is attached hereto and
made a part hereof;

IT IS ORDERED THAT:

1. Within 30 days from the date of service of this order The Flying Tiger Line, Inc., shall file a cancellation of its Official Passenger Charter Tariff No. 2, C. A. B. No. 23, such cancellation to be effective on one day's notice and to bear the following notation: "Issued on one day's notice to the public and the Civil Aeronautics Board on authority of C. A. B. Order Serial No. E-6539, dated June 20, 1952";
2. Within 30 days from the date of service of this order Resort Airlines, Inc., shall file a cancellation of its Spe-

cial Service Tariff No. 1, C. A. B. No. 9, such cancellation to be effective on one day's notice and to bear the same notation as that set forth at the end of the preceding paragraph;

585 3. The above-entitled proceeding insofar as it relates to Charter Tariff No. 3, C. A. B. No. 11, heretofore filed by Resort Airlines, Inc., be and it hereby is dismissed.

By the Civil Aeronautics Board:

(SEAL)

/s/ M. C. MULLIGAN
M. C. Mulligan
Secretary

BRIEF OF PETITIONER
THE FLYING TIGER LINE INC.

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA ~~CIRCUIT~~

—
No. 11,529

—
THE FLYING TIGER LINE INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

—
On Petition to Review an Order of the Civil Aeronautics Board

—
NORMAN L. MEYERS,
ELMER E. BATZELL,
201 Shoreham Bldg.,
Washington 5, D. C.,
Attorneys for Petitioner.

MEYERS & BATZELL,
201 Shoreham Building,
Washington 5, D. C.,
Of Counsel.

QUESTION PRESENTED

. Whether the Civil Aeronautics Board, in determining that Passenger Charter Tariff No. 2, filed by Tigers, was unlawful and must be cancelled, properly construed the Civil Aeronautics Act, which, in part, provides in Section 401(f) that "Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board."

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,529

THE FLYING TIGER LINE INC., *Petitioner*
v.
CIVIL AERONAUTICS BOARD, *Respondent*

On Petition to Review an Order of the Civil Aeronautics Board

BRIEF OF PETITIONER
THE FLYING TIGER LINE INC.

JURISDICTION

The jurisdiction of the Court in this proceeding rests upon Section 1006 of the Civil Aeronautics Act of 1938, as amended (49 U.S.C., §646). The Civil Aeronautics Board, by Order E-6539, dated June 20, 1952, determined that Official Charter Tariff No. 2, C.A.B. No. 23, filed by The Flying Tiger Line Inc., was unlawful and directed that such tariff be cancelled on the ground that The Flying Tiger Line Inc. does not have legal authority, under

Section 401 of the Civil Aeronautics Act of 1938, as amended (49 U.S.C., § 401, et seq), to make charter trips carrying persons and their baggage. The Flying Tiger Line Inc. has a direct, immediate and substantial interest in the decision of the Civil Aeronautics Board and, accordingly, is entitled, pursuant to the provisions of Section 1006 of the Civil Aeronautics Act of 1938, as amended, to judicial review of the said order. The petition for judicial review was duly filed by Petitioner on August 19, 1952.

STATEMENT

The matter before the Court is solely an interpretation of the language of the Civil Aeronautics Act (hereinafter sometimes known as the Act) and the application of that language to a tariff properly filed by The Flying Tiger Line Inc., (hereinafter sometimes known as Tigers) pursuant to the regulations of the Civil Aeronautics Board (hereinafter sometimes known as the Board). The Tigers' view is that the language means literally what it says and that the Tigers as an air carrier is entitled to file the charter tariff and to have such tariff accepted by the Board if the tariff is not otherwise illegal.

Tigers is a corporation organized under the laws of the State of Delaware and has its principal offices at the Lockheed Air Terminal, Burbank, California. Tigers is an air carrier operating under a temporary certificate of public convenience and necessity, issued for a period of five years by the Board on August 12, 1949 (Joint App., p. 7). Under its temporary certificate Tigers is authorized to establish and has established scheduled airfreight service between the Eastern Seaboard and the West Coast. This route pattern is designated Route 100.

The operations that Tigers conduct on this Route 100 are common carriage operations, with the Tigers providing over Route 100 only regularly scheduled service, such service for the carriage of airfreight only. In addition to its common

carriage airfreight operations over Route 100, Tigers has developed a substantial complementary business broadening and diversifying its operations. Such diversification has been obtained, in part, by the development of plane-load airfreight and passenger movements on a charter basis.

Pursuant to Part 207 of the Economic Regulations of the Board, effective May 1, 1951 (Appendix A, page A-3), Tigers filed with the Board its Official Passenger Charter Tariff No. 2, C.A.B. No. 23, to be effective on May 26, 1951 (Joint App., page 10). American Airlines, Inc., Eastern Airlines, Inc., Trans World Airlines Inc. and United Air Lines, Inc. filed with the Board individual complaints alleging that this Tiger tariff was unlawful and requesting the Board to reject or suspend that tariff (C.A.B. dockets 4924 and 4927). Answers were duly filed to these complaints by Tigers and dismissal was requested. By Serial Order E-5414, dated May 25, 1951, entered in Docket No. 4924, the Board suspended the Tiger tariff and ordered an investigation to determine whether the rules, regulations, rates and charges contained in that tariff were unlawful (Joint App., p. 21).

In August 1951, the Board by order (Serial Order E-5616) continued the period of suspension to November 21, 1951. In July 1951, the Board by order (Serial Order E-5526) instituted an investigation with respect to the tariff filed by another airline and consolidated that case with the investigation ordered with respect to Tigers' tariff.

American Airlines, Inc., Eastern Airlines, Inc., Trans World Airlines Inc. and United Air Lines, Inc. were made parties to the proceedings in Docket No. 4924, so consolidated; and Chicago & Southern Airlines, Inc. was granted leave to intervene. After due and proper notice to the public and all parties, a public hearing was held. Briefs and reply briefs were filed and an Examiner's Report was prepared and submitted (Joint App., p. 33, et seq.) to the Board. Provision was duly granted for taking of exceptions to the Examiner's Report and appropriate exceptions were taken. On April 20, 1952, the matter was argued

before the Board and on June 20, 1952, the Board issued its order (Serial Order E-6539), in which, among other things, the Board determined that the Official Passenger Charter Tariff No. 2, C.A.B. No. 23, filed by The Flying Tiger Line Inc., was unlawful and directed that the tariff be cancelled on the ground that the air carrier does not have legal authority under Section 401 of the Civil Aeronautics Act of 1938, as amended, to engage in air transportation carrying persons and their baggage on charter trips (Joint App., p. 60, et seq.). The sole issue in this case is the error of the Board in making such a determination on the ground that Tigers could conduct a special service limited only to property. There are no issues of fact to be resolved and there is no question about any aspect of the tariff, excepting whether the Tigers as an air carrier may properly file such a tariff.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Civil Aeronautics Act of 1938, 52 Stat., 977, as amended (49 U.S.C., § 401, et seq.), hereinafter referred to as the Civil Aeronautics Act, are set forth in Appendix A, *infra*, pages A-1 through A-3. The pertinent provisions of Part 207 of the Economic Regulations which purport to set up rules for and regulations for charter trips, issued by the Civil Aeronautics Board pursuant to Section 401(f) of the Civil Aeronautics Act, are set forth in Appendix A, *infra*, pages A-3 through A-4.

STATEMENT OF POINTS

The Civil Aeronautics Board erred—

1. In holding the passenger tariff unlawful and in directing its cancellation, the Board having erroneously construed the statutory authority granted an air carrier by the Civil Aeronautics Act and having improperly and erroneously substituted its judgment for the Congressional mandate contained in the Act itself.

2. In holding that the passenger charter tariff is unlawful in that it fails to follow Part 207 of its own Economic Regulations, promulgated under Section 401(f) of the Civil Aeronautics Act of 1938, on which Part 207 Tigers and all other air carriers have been and are entitled to rely.

The real issue posed by the Board's failure properly to apply the Act is whether Tigers can perform all types of special service, including charter trips, or whether Tigers can perform charter trips for only that type of service which has been specified by the Board in the certificate granted to Tigers. A determination in favor of the Board in this matter means that Tigers may not conduct unlimited charter trips as a part of its special service authority. Tigers contends the Board has no power to modify in such fashion the Congressionally granted authority contained in the last sentence of § 401(f) of the Act.

SUMMARY OF ARGUMENT

- I. In addition to the authority to render transportation of property services pursuant to its certificate duly granted by the Board, The Flying Tiger Line Inc., as a matter of a straightforward reading of the provisions of the Civil Aeronautics Act of 1938, as amended, has been authorized by the Congress to conduct charter and other special services unlimited by the terms of its certificate.
- II. While not necessary to a decision, a review of the legislative history of the Civil Aeronautics Act and the Congressional consideration of interpretations surrounding parallel legislation clearly indicates Congressional support of the contention advanced by The Flying Tiger Line Inc. The legislative history, while not extensive, confirms the view that it was Congress' intention to grant to an air carrier, regardless of the nature of its certificate, the right to conduct an unlimited charter or other special service.

III. No action which the Board can take in respect of the grant of a certificate can in any way alter the right of an air carrier to render charter or other special service. Once a citizen qualifies as an air carrier through the receipt of a certificate permitting him to engage in air transportation and to render the service specified in the certificate by the Board, he may, through the authority specifically conveyed to him by the Congress in the last sentence of Section 401(f) of the Act, make charter trips or perform any other special services. The power of the Board is merely to prescribe regulations under which that air carrier may perform the special services, including charter trips, which are in addition to those general services that he has been certificated to conduct by the Board as a necessary incident to his becoming an air carrier under the Act.

IV. The Board makes two basic contentions, neither of which supports the view that it was the Congressional intent to limit special services, including charter trips, to the service specified in the certificate. It was properly the burden of the Board and not the Tigers to establish the Board's contention, since Tigers' tariff was properly filed under existing Board regulation. The Board has not sustained the burden of positively justifying its view of the law, but has contented itself with disagreeing with Tigers' view of the law.

V. The legislative history of the regulatory scheme of the Civil Aeronautics Act supports the view contended for by Tigers. Contrary to suggestions made by the Board, the legislative scheme erected by the Congress in the Civil Aeronautics Act clearly envisaged treatment for special services, including charter trips, and for contract operations quite different from the treatment accorded route type common carriage operations.

ARGUMENT

Part I

In Addition to the Authority to Render Transportation of Property Services Pursuant to Its Certificate Duly Granted by the Board, The Flying Tiger Line Inc., as a Matter of a Straightforward Reading of the Provisions of the Civil Aeronautics Act of 1938, as Amended, Has Been Authorized by the Congress to Conduct Charter and Other Special Services Unlimited by the Terms of Its Certificate.

A) The task at issue is to examine the statute and the provision upon which Tigers relies and to ascertain whether or not that provision means what it seems to mean. The position reached by the Civil Aeronautics Board is, of course, the opposite of that contended for by the Tigers.

The provision upon which Tigers relies is the last sentence of Section 401(f) of the Act. That sentence reads:

“Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board.”

The language is unambiguous and the sentence structure is simple. In these circumstances, the rule of law is the rule of common sense. If the language is free from ambiguity, it is the Court's duty to find, if possible, the scope and meaning from the language used. There is no room for construction. See *Gardner v. Collins*, 2 Pet. 58 (1829); *U. S. v. Lexington Mill and Elevator Co.*, 232 U. S. 399 (1914).

There will be occasion later to discuss by reference to appropriate legislative history and other parallel legislation the correctness of the conclusions drawn from an examination of the language itself. It is Tigers' view, however, that, despite the Government's argument to the contrary, the Congress actually meant what it said.

B) The sentence in question consists of a single independent clause and two dependent phrases. The independent clause can stand alone and, when standing alone, forms

a complete thought. This simple, main clause is: "Any air carrier may make charter trips or perform any other special service . . ."

The clause says that any person who can fit the category of an air carrier may make charter trips or perform any other special service. Nothing in this clause says that the charter service or other special service which may be rendered is limited to the service which that person may perform as an air carrier. Nor can any such conclusion be reached as a matter of English, logic or law.

Under the clause as written the Congressional mandate is simple and direct: If you are qualified as an air carrier, then you may render charter service or other special service; if you are not so qualified, then nothing in this clause enables you to render a charter service or any other special service. And if careful attention and examination be given to the Act in its entirety (see particularly, § 1, §§ 401-416), it will be found that unless the charter service or other special service is rendered under this clause, there exists no permission elsewhere in the Act for the rendering of any such service. This is important as a part of the general purpose of the Congress with respect to civil air regulation, developed in detail below (Part V).

C) An "air carrier" is one engaged in "air transportation" (Section 1(2)). Air transportation is interstate *or* overseas *or* foreign transportation by air *or* transportation of mail by air (Section 1 (10)). Section 1 (21) of the Act, defining interstate air transportation, overseas air transportation and foreign transportation, emphasizes the breadth of the definition, so far as the nature of the service is concerned, by pointing out that these terms mean "the carriage by aircraft of persons *or* property . . ." (Italics supplied).

The statute thus provides legislative authority to any air carrier, if it is engaged in air transportation in any manner under a certificate of public convenience and necessity, to make charter trips and perform other special serv-

ice. The language of the last sentence of Section 401(f) standing alone, or read in conjunction with the rest of that Section or with the other provisions of the Act, makes clear that permission is granted to any citizen to render a special service, inclusive of charter trips, if that citizen has qualified as an air carrier.

D) The last sentence of Section 401(f), as has been pointed out, contains two dependent phrases. They are dependent because they cannot stand alone and because neither, taken alone, forms a complete, comprehensive and unified thought. Neither has a subject nor a predicate. Neither is a sentence nor a clause.

Consider the first dependent phrase: "without regard to the points named in its certificate." Obviously, it is meaningless unless associated with a previous complete thought. Consider the second phrase: "under regulations prescribed by the Board." It is equally meaningless unless similarly associated.

It may be conceded that both of these phrases modify the independent thought with which they are associated. Neither, however, is a substitute for that independent thought nor, without the independent thought, has any intrinsic validity. The first dependent phrase is explanatory of the independent thought; the second limits the scope. But it is not appropriate in considering the nature of either dependent phrase to try to substitute the substance of the dependent phrase for the substance of the independent thought.

This is precisely what the Civil Aeronautics Board has done, however, when it has decided that the last sentence of Section 401(f) means that while Tigers can render only the same type of charter service or other special service as Tigers is authorized to render in its certificate, it can do this without regard to its route pattern.

In simplest terms the Board is saying that the last sentence of § 401(f) really means Tigers can render only the same services it is authorized under its certificate but with-

out regard to route. If this be so, then the first portion of that sentence becomes meaningless as written, but since this is not so and cannot be admitted even by the Board, the Board has hit upon the ingenious device of introducing a non-statutory concept, "class of traffic" (Board's Opinion, J. App. p. 65), as a method of extricating itself from the dilemma. (See Part IV)

The dependent phrase "without regard to the points named in its certificate" is separated from the other dependent phrase *and from the independent thought* by commas. The legislative history outlined below (Part II) shows that the comma separating the independent thought and the dependent phrase was deliberately inserted. Neither the Civil Aeronautics Board nor the Courts can ignore this fact, although ignoring it is precisely what the Board does in reaching its conclusion. The Board's inclination to forget the comma, even in deciding this case in which it is all-important, is clearly evident from the CAB's own opinion. There, at the outset (Joint App., p. 62), the Board describes the authorization contained in the last sentence of § 401(f); and in so doing, eliminates the comma from the description.

It is respectfully submitted to the Court that if the first comma be removed, as is done by the Board, the independent thought is no longer the same independent thought as that set forth in the Act but, in fact, becomes—

"Any air carrier may make charter trips or perform any other special service without regard to the points named in its certificate, . . ."

In such a circumstance, it is clear, as a matter of English and as a matter of law, that the exemption in the last sentence of Section 401(f) would be appreciably more restrictive than the sentence as it actually appears. It would further be clear, in such circumstance, that the sole problem of concern to Congress was whether services to the extent authorized by the certificate could be made available to off-route users. The fact is and the legislative history

shows that the clause was not so written and that while it was proposed in the fashion set forth above in the Senate version, the Congress took the deliberate step of inserting the comma, thereby giving full scope to the independent clause and altering the status of the language, "without regard to the points named in its certificate," from that of limitation to that of explanation.

Neither the Board nor the Court may properly disregard what the Legislature was at pains to make clear, and the effort of the Board to do so is violative of the precise provisions of the statute.

E) The language employed, as a matter of simple English and as a matter of law, states that if a carrier has qualified as an air carrier, then it may perform any charter service and any other special service. Such charter service or other special service is not limited by any limitation in the certificate received by such air carrier. If the certificate makes a carrier an "air carrier," the statute then says that that air carrier *may perform a charter service and any other special service*. This is true, no matter what the service may be that was approved in the certificate. (See Part III, *infra*)

There are two dependent phrases. One of those phrases says, so as to negative all doubt, that the charter service or other special service may be performed without regard to the route pattern in the certificate of the air carrier. This phrase had a reason for being inserted in the Act at the time the Act was passed and that reason is touched upon in the discussion below (Part II, B and C). The second phrase is that the Board may prescribe regulations under which charter trips or other special service can be rendered, thereby providing the Board with a mechanism for maintaining a reasonable control over charter operations. (See Part V)

Neither phrase, however, limits as a matter of English, logic or understanding in the statute under consideration the scope of the independent clause with which each is associated.

The independent clause is clear. It provides exemption directly for a class of service different from that permitted by certificate. The exemption is direct and without limitation. As a matter of elementary statutory construction, nothing further is needed to give the literal words in their context, their true meaning. The position taken by the Board is without support as a matter of grammar, logic or law. (See Part III for prior decisions contrary to position now taken by Board).

Part II

While Not Necessary to a Decision, a Review of the Legislative History of the Civil Aeronautics Act and the Congressional Consideration of Interpretations Surrounding parallel Legislation Clearly Indicates Congressional Support of the Contention Advanced by The Flying Tiger Line Inc. The Legislative History, While Not Extensive, Confirms the View That It Was Congress' Intention to Grant to an Air Carrier, Regardless of the Nature of Its Certificate, the Right to Conduct an Unlimited Charter or Other Special Service.

A) The original Senate version of the legislation which ultimately became the Civil Aeronautics Act of 1938 contains as the last sentence of Section 401(f), a provision which reads as follows:

“Any air carrier may make charter or special trips without regard to the points named in its certificate, under regulations prescribed by the Authority.”

As has been pointed out above, this language necessarily contained an independent clause much more restrictive in nature than that contained in the final legislation. The clause is further restrictive in that the word “trips” is modified by the adjective “special”, as a result of which the type of service permitted to be rendered under that original Senate exemption was relatively narrow.

This original version was amended in the Senate (Congressional Record, Vol. 83, Page 6752) to strike out the

words "or special" and to insert after the word "trips" the language "or perform any other special service". The sentence, as amended, then read:

"Any air carrier may make charter trips or perform any other special service without regard to the points named in its certificate, under regulations prescribed by the Authority."

This amendment in the Senate obviously broadened the scope of service covered by the exemption. No longer was the exemption to be confined purely to charter or special trips. The exemption now was to be sufficiently broad as to include charter services, special trip services and a vast body of other services, presumably not regularly associated as a part of the services which the carrier might conduct under its certificate. The broadening in this direction is helpful to the conclusion that the Congress positively intended a distinction between the charter and other special services authorized in the last sentence of Section 401(f) and the service to be specified as a part of the certificate, referred to in the first sentence of Section 401(f).

The amendment did not, however, rectify the limitation in the breadth of the exemption which arose from making the dependent phrase, "without regard to the points named in its certificate", an integral part of the independent clause, "Any air carrier may make charter trips or perform any other special service . . ."

The House version, from the outset, clearly separated the scope of the independent clause and the dependent phrase. In the House version, the dependent phrase, "without regard to the points named in its certificate," was never permitted to impose a limitation upon the independent clause. The House version, from the outset, read (Congressional Record, Vol. 83, page 7067):

"Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Authority."

The words and the order in which they were placed were now identical in both the original House version and in the amended Senate version; but, the meaning between the two versions was quite different. And the difference in that meaning stemmed directly from the existence of a comma after the independent clause in the House version, and the lack of that comma in the Senate version.

After the Senate had passed its original bill, it came in due course to the attention of the floor of the House. The Senate bill (S. 3845) was legislatively compared with the House bill (H.R. 9738) and the House bill was substituted for that of the Senate.

The Congressional Record, Volume 83, page 7104, reflects the above as follows:

“Lea: I ask unanimous consent to take from the Speaker’s table the bill S. 3845, strike out all after the enacting clause and insert in lieu thereof the provision of the bill just passed by the House (H. R. 9738).

“Speaker Pro Tem: Is there objection to the request of the gentleman from California? The Chair hears none, and, without objection, the amendment to the Senate bill will be agreed to and the Senate bill read a third time and passed.

“A motion to reconsider was laid on the table.”

The differences in the legislation required reference of the matter to a Conference Committee. The differences were resolved in conference. So far as the portion of the legislation here under consideration is concerned, however, the conference version (Congressional Record, Vol. 83, page 8849) of the legislation accepted the House version, with a comma after the word “service” and a comma after the word “certificate”.

It is neither a matter of argument nor conjecture as to the legislative intent. The Senate version, originally in two respects far more confining than the House version, was deliberately modified by the Congress of the United States and the substantive elements in the legislation posi-

tively changed so as to conform to the enlarged authority conveyed directly by Congress to an air carrier insofar as that air carrier might carry on charter trips or other special services.

B) The legislative history is enlightening as to why the dependent phrase, "without regard to the points named in its certificate", was inserted in the legislation at all. The legislative history clearly shows that a major consideration for the insertion was a bitter controversy as to the rights of carriers to conduct so-called "off-line" business. As the Act was passed it was the Congressional intention to require a route pattern or "line haul" arrangement in the certificates to be granted to carriers, but not to limit those carriers to that route pattern or line haul when undertaking charter or other special service. In view of preceding air and motor carrier (See Part II(C)) legislation and the interpretations placed thereon by the Interstate Commerce Commission (I.C.C.) the Post Office Department and the War Department, which agencies had previously been concerned with civil air development, it is clear that Congress found it desirable and perhaps even necessary specifically to point out that when an air carrier undertook charter or other special service, that carrier did not have to limit itself to the line haul in order, for example, to continue to receive mail pay. Briefly, in the succeeding paragraphs Tigers shows the historical development which led to the inclusion of the dependent phrase which the Civil Aeronautics Board now wishes to make into an integral part of the independent clause and which has proved so controversial.

The Civil Aeronautics Act was the outcome of a series of Congressional bills and hearings thereon beginning in 1934, shortly after the cancellation of all domestic air mail contracts as a result of the mail contract scandals revealed in the Senate Black Committee investigation (Senate hearings on S. 3659, 75th Cong., 3d Sess. p. 6 et seq.; S. Rep. 1661, 75th Cong., 3d Sess. p. 2; Senator McCarran, 83 Cong. Rec. 6628, 6635-37).

The Air Mail Act of 1934 (48 Stat. 933) was enacted as a temporary measure pending adoption of long-range legislation.

In the ensuing year air mail contractors protested to Congress about destructive competition over mail routes, primarily from other mail contractors conducting "off-line" operations carrying passengers and express business of the lines on which they held air mail contracts, and on the lines of the protestants.

In 1935 the Air Mail Act of 1934 was amended, and chief among the sections amended was Section 15 (1934—49 Stat. 619). The amended Section 15 prohibited any new off-line flying by air mail contractors which in any way competed with passenger or express service available upon another air-mail route, and, in connection with established off-line flying, authorized the Interstate Commerce Commission, after due application, notice and hearing, to bar nonmail flights of an air-mail contractor if they were found to affect adversely or unfairly the service of another air-mail contractor.

Sponsors of the amendment to Section 15 in the House stated that the bar to new off-line flying and the threat to existing off-line flying would affect independent operators (nonmail carriers) as well as air-mail contractors (79 Cong. Record, 4935 et seq). But in the Senate it was made clear that the amendment related solely to the air-mail contractors (79 Cong. Record, 12482). In the Senate it was made clear that Section 15, as amended, would not interfere with an "off-line operator" if he had no air-mail contract (79 Cong. Record, 12676).

The bar to competitive off-line flying only accentuated the problem. Controversies between air-mail contractors over what constituted off-line flying raged. United Air Lines Transport Corp. instituted off-line passenger service from Philadelphia to Cleveland via Allentown; TWA claimed a violation of law; the Post Office agreed (Opinion—Solicitor of P.O. Dept., August 23, 1927). TWA (TWA

San Francisco Operation—220 I. C. C. 163; 213 I. C. C. 551; 214 I. C. C. 552) and American (American Air Lines, Inc.—Detroit-Cincinnati Operations, 225 I. C. C. 333) filed applications with the I. C. C. for “off-line service,” to serve San Francisco and Detroit-Cincinnati, respectively; the I. C. C. denied the applications.

TWA thereupon, having been denied its San Francisco route for off-line flying, obtained it by making a bid of one mill per airplane for an air-mail contract—for a maximum potential compensation of \$424.12 per year (TWA Mail Bid 223 I. C. C. 281; House Hearings on HR 9378, 75th Cong., 3d Sess., p. 436).

The off-line flying battle continued right up to the time of passage of the Civil Aeronautics Act of 1938. For a “contract” from Houston to San Antonio via Brownsville, Eastern Air Lines successfully bid zero cents per airline mile to carry the mail against a Braniff bid of \$0.0001907378 (American Aviation, Sept. 1, 1938).

Both the Post Office and the I. C. C. sought a solution to this problem in the new legislation. The I. C. C. noted the additional threat from free, unregulated operations of independent companies having no air-mail contracts (Hearings on H.R. 5234, 75th Cong., 1st Sess., p. 17-18).

In considering off-line flying the Congress took account of the various categories of carriers then in operation, and specifically of 1) air-mail contractors confining activities to contract routes, 2) air-mail contractors with off-line operations in competition on other air-mail contractors' routes, 3) air-mail contractors with off-line operations non-competitive with other air-mail contractors, and 4) non air-mail operators.

The Congress resolved the off-line flying problem by various provisions of the new Civil Aeronautics Act of 1938: a) Section 15 of the Air Mail act was specifically repealed (Section 1107(k) Civil Aeronautics Act of 1938). b) Section 401(a) requires all categories of operators (except intrastate operators over whom there is no Federal

control) to hold certificates, according "grandfather" rights to existing operators. As a result, for certificated operations there now is no off-line flying. c) Section 401(e)(1), in spelling out the grandfathers' rights, assured certificates both to carriers of all classes of traffic except mail, as well as to carriers of all classes including mail. d) Section 401(f) makes provision for terms and conditions of certificates and requires that certificates specify points and the service to be rendered. e) Section 401(f) also makes provision for charter flying and other special services to round out the Congressional plan of a regulated industry.

In addition to the certificated flying, by this provision, the Congress authorized non-scheduled flying. The authorization was broadly given to "any air carrier" regardless of the classes of traffic for which it is certificated. And to make clear that such flying could be "off-line," the Congress provided that such flying by any carrier was to be "without regard to the points named in its certificate."

The reason for the insertion of the dependent phrase,— "without regard to the points named in its certificate"— makes the legislation intelligible. The significant aspect, however, is that Congress took positive steps not only to insert the phrase to correct an off-line flying problem but also *to insert it in such manner as to avoid making it a phrase of limitation rather than a phrase of explanation.*

C.) The legislative history with respect to the reasons for including the phrase, "without regard to the points named in its certificate," would not be complete unless reference were made to the action taken by Congress which followed an Interstate Commerce Commission decision on a somewhat similar charter authority provision of the Motor Carrier Act.

Legislation on the economic regulation of air carriers had invariably contained a provision with respect to charter and special services. In the legislation introduced prior to 1938, such provisions were usually in a form which

said that the charter services could be operated "to any place" (See S. 3420 as reported August 15, 1935, 74th Cong., 1st Sess.; H.R. 5174, 74th Cong., 1st Sess.) or were in a form which extended the authority to operate without making any reference to the places which might be serviced (see S. 2 as reported June 7, 1937, 75th Cong., 1st Sess.; H.R. 7273, 75th Cong., 1st Sess.). In contrast with preceding legislation, in all legislation introduced with respect to civil aviation during 1938, the phrase, "without regard to the points named in its certificate", appeared (see H.R. 9738, 75th Cong., 3rd Sess.)

There was a very good reason for the inclusion of the phrase in 1938 which had not existed in the prior years. That reason was the decision of the Interstate Commerce Commission in 1938, *Peninsula Transit Corp.—Com. Car. Application*. (1 M. C. C. 440). In that case the Commission decided it had the power under Section 208(c) of the Motor Carrier Act to restrict by its regulations the origin of motor vehicle charter trips to points on the certificated routes of the motor carrier. Section 208(c) of the Motor Carrier Act provided that a certificated carrier could only operate charter trips "to any place".

A consideration of the legislative history set forth above coupled with the Congressional desire to give freedom to charter services and other special services, even though they be conducted between points not related to the points specified in the certificate of the air carrier, clearly points to the conclusion that the phrase considered here was inserted specifically to avoid such administrative anomalies as had been introduced in the Motor Carrier Act by the decision of the I. C. C. in the Peninsula Case. It is clear from the available legislative material that the phrase was introduced in the legislation as a means of broadening rather than restricting the scope of the charter and other special service authority conveyed by Congress to the air carrier.

Congress rejected the original Senate version of the provision; Congress was aware of and provided against the general problems of line haul and off-line movement; Congress took action to avoid the restrictive aspects of the Interstate Commerce Commission decision in the Peninsula Case. It is apparent that the Congressional intent supports completely the natural and direct reading of the provisions of the last sentence of Section 401(f) of the Act as set forth in Part I above. The Act is unambiguous. Resort to legislative intent is not necessary. If resort is had, however, it is clear that the legislative intent was fulfilled in an unambiguous provision which the Civil Aeronautics Board has disregarded in favor of a narrowly restrictive interpretation adding measurably to the Board's authority in derogation of Congressional limitations and intent.

Part III.

No Action Which the Board Can Take in Respect of the Grant of a Certificate Can in Any Way Alter the Right of an Air Carrier to Render Charter or Other Special Service. Once a Citizen Qualifies as an Air Carrier Through the Receipt of a Certificate Permitting Him to Engage in Air Transportation and to Render the Service Specified in the Certificate by the Board, He May Through the Authority Specifically Conveyed to Him by the Congress in the Last Sentence of Section 401(f) of the Act Make Charter Trips or Perform Any Other Special Services. The Power of the Board Is Merely to Prescribe Regulations Under Which That Air Carrier May Perform the Special Services, Including Charter Trips, Which Are in Addition to Those General Services That He Has Been Certificated to Conduct by the Board as a Necessary Incident to His Becoming an Air Carrier Under the Act.

A) The Board from its earliest days has conceded that the authority of a certificate-holding carrier to engage in charter business and special services is not within the authority the Board can grant, nor is that authority one to be defined or restricted by Board action. The authority is solely the broad one granted by statute. In one of the first

cases to come before the Board, the Board stated, *Western Air Corp.—Grandfather Certificates*, 1 C.A.B. 39, p. 42:

“From July 1, 1938 to August 22, 1938, scenic flights of approximately 30-minute duration were conducted by applicant at specified hours on Saturdays and Sundays, originating and terminating at West Yellowstone. As to these scenic services originating and terminating at West Yellowstone, Mont., we are of the opinion that applicant’s request that such service be authorized specifically in the certificate of convenience and necessity must be denied . . . We believe that the scenic service under discussion is a type of ‘special service’ referred to in Section 401(f) above and *for which no authorization in the certificate of public convenience and necessity is necessary.*

“By virtue of the same provision quoted above, we also consider it *unnecessary to include in the certificate any authorization to engage in any ‘charter’ or ‘special’ services performed by applicant during the ‘grandfather’ period.*” (Italics supplied)

In 1942, an air carrier, not a grandfather, requested a modification of its certificate to authorize it to provide direct transportation to special events. The Board stated, *Pioneer Air Lines, Inc.*, 7 C.A.B. 469:

“No amendment of the certificate is necessary to permit this type of operation as Pioneer can do this under its present authority to engage in charter operations . . . ”

Judicial confirmation of the interpretation of the basic statutory provision is found in *Pacific Northern Airlines v. Alaska Airlines*, 80 F. Supp. 592, 603, in which the Court stated:

“It is, therefore, evident that under Section 401 of the Act a common carrier is required to hold a certificate, unless exempted under the authority given to the Board in Section 416(b)(1), but that a certificate holder, under Section 401(f) of the Act, may make charter trips or perform any other special service,

without regard to the points named in its certificate, under regulations prescribed by the Board, which may be regarded as a *quasi exemption* in itself, or, better, *an expressly declared right granted, not by action of the Board, but by law.* In view of the language used, it would appear that the Board may regulate, but not proscribe, the 'charter trips' and 'any other special service' mentioned in 401(f)." (Italics supplied)

In the 12 years since the *Western Air Case*, in cases involving certificates for passengers, property and mail, it was recognized that the applicants need not establish the need for charter and special services nor cover the question of such services in their evidence. (Exhibit Resort No. 1, p. 3; Tr. p. 104).

B) In the *Airfreight Case*, in which the Tigers received its certificate for the carriage of property, likewise there was no evidence directed to covering the question of such services when the Tigers became a certificated carrier. Such evidence as there was concerning contract or charter movements of passengers or property was historical, describing past actions under contract operations or non-scheduled operations under Part 292.1 of the Economic Regulations. (See Exhs. United No. 1, Eastern No. 1 and American No. 1; Tr. pp. 126-136) As in all other certificate cases, in the *Airfreight Case* the question was not raised whether there was a need to present evidence respecting charter and special services. (See Exhibit Resort No. 1, p. 3; Tr. p. 104) Inasmuch as the authority relating to charter and special services is an "expressly declared right granted, not by action of the Board, but by law," no evidence relating to charters and special services would have been proper. *Western Air Express* and *Pioneer* cases, *supra*.

In due course the Tigers received its certificate of public convenience and necessity for route operations. Pursuant to its showing and requests for certification, it received a certificate for the carriage of cargo only. As in the case

of all other certificates issued by the Board, the Tiger certificate makes no reference to charter and other special services. Charter and special service authority comes by operation of law and not by grant in the certificate.

C) The Board has at all times prior to this investigation been consistent in its interpretation of the charter provisions of the Act. In its Regulation of Charter Trips and Special Services (Part 207), the Board states (Section 207.2, Appendix A, p. A-4) that this Regulation—

“shall apply to all air carriers (other than Alaskan air carriers) who hold currently effective certificates of public convenience and necessity issued by the Board pursuant to section 401 of the Act.”

The Tigers holds such a certificate.

And Part 207 defines a “charter trip” as one for the movement of either passengers *or* cargo (Section 207.1, Appendix A, p. A-3). Under the Act, the Board could not do otherwise. Under the Act, and under Part 207, the Tigers can handle charter movements of passengers or property.

The prior consistent view of the Board is paralleled by the consistent view of the Interstate Commerce Commission in considering a somewhat similar provision of the Interstate Motor Carrier Act. In general, the differences between the two statutes are so great as to make utilization of I.C.C. interpretations somewhat dangerous as precedent for Court decision in Board cases. It may, nevertheless, be helpful to point out, in connection with Section 208(c) of the Interstate Motor Carrier Act authorizing “special or chartered parties”, that the I.C.C. has expressly held the charter and special services authority granted a carrier has as its source the legislative grant and is not derived from the I.C.C. certificate. (*Peninsula Transit Corp. Com. Car. Application*, 1 M.C.C. 440; *Virginia Stage Lines, Inc., Com. Car. Application*, 2 M.C.C. 214; *Mount Hood Stages, Inc., Com. Car. Application*, 8

M.C.C. 45; *Washington Motor Coach Co., Inc., Extension of Operations*, 27 M.C.C. 727.)

The consistent interpretation of the expert administrative body, the Board, paralleled by the Interstate Commerce Commission, has, up until this case, been consonant with the literal and unambiguous meaning of the Act and the Congressional intent, as described in parts I and II, above. In instances where this matter has come before the Courts, the judicial interpretation has likewise confirmed the simple and direct reading of the statute and the clear-cut expression of legislative intent.

Part IV

The Board Makes Two Basic Contentions, Neither of Which Supports the View That It Was the Congressional Intent to Limit Special Services, Including Charter Trips, to the Service Specified in the Certificate. It Was Properly the Burden of the Board and Not the Tigers to Establish the Board's Contention, Since Tigers' Tariff Was Properly Filed Under Existing Board Regulation. The Board Has Not Sustained the Burden of Positively Justifying Its View of the Law, But Has Contented Itself With Disagreeing With Tigers' View of the Law.

A) The first basic contention of the Board is that the "charter trip" or "other special service" which an air carrier may undertake is at the same time both the same as and different from the "service" which the Board specified in the certificate to that carrier.

"It s the same as," says the Board, "since if we specify that you can render only property service, you can render only property service. It is different," says the Board, "since you may undertake charter or other special service without specific authority from us because the last sentence of Section 401(f) automatically gives you that right."

"Now," says the Board, "to the extent that it is the same 'service', the last sentence of Section 401(f) gives you no authority except, of course, to undertake the 'service' that we specify in the certificate. Therefore, we de-

termine what 'service' you can render. On the other hand, to the extent that it is a different 'service', you can conduct 'charter trips' or 'other special service' and we don't have any authority to grant, deny or determine this 'service' because Congress gave the right to you directly."

The above paraphrase in quotation marks is an accurate representation of the Board's position (Board's Opinion, Joint App. pp. 64-66). Reduced to these simple terms, the position is extremely confusing. It is this confusion that has necessitated bringing the matter here for ultimate decision.

In effect, the Board is making the word "service", as used in the Act, walk simultaneously in opposite directions. The way the Board does this is by introducing another idea—"class of traffic" (See Joint App., page 64)—as a substitute for the word "service". This idea of "class of traffic" is nowhere embraced in the statute and nowhere given statutory authority. The idea is useful to the Board in this circumstance, however, since it enables the Board to add to the statutory distinction between specified "service" and "special service", a non-statutory distinction which it calls "class of traffic". The mere addition of this non-statutory distinction requires the conclusion reached by the Board.

In the succeeding paragraphs an analysis of the meaning of Section 401(f) and use of the word "service" in that Section is set forth. This analysis clearly points the fallacy in the Board's reasoning and brings into the open the ingenious, but extremely artificial, verbal device by which the Board was able to make the statutory language go in two directions at the same time.

The first sentence of Section 401(f) says that the Board shall specify the service which an air carrier may undertake. There is no argument about this. The last sentence of Section 401(f) says that an air carrier by virtue of being an air carrier may perform any special service, which includes charter trips and other matters. Both the

Board and the Courts agree that in respect of the last sentence, whatever authority is conveyed is conveyed by Congress and not by the Board (See Part III, *supra*).

The matter, then, stands this way. Pursuant to the first sentence of Section 401(f) the Board specifies the service in an air carrier's certificate. The word "service" means and is comprehensive of the carriage of persons, property or mail; or, otherwise, the Board has nothing to specify. (All parties concede the Board may specify, see *American Airlines Inc. et al. v. C. A. B.*, 192F2(d) 417). In the instance of the Tigers, the Board *specified* that the "service" which Tigers should undertake is essentially the carriage of property only on a common carriage basis between specified points (See Joint App., page 7).

In the last sentence of Section 401(f) the Congress says that "any . . . special service"—not any *specified* special service—may be undertaken by an air carrier. The Congress says further, that a special service is, at the least, inclusive of "charter trips". Inasmuch as the word "service", as used by the Congress, in the first sentence of Section 401(f) is comprehensive of the carriage of persons, property or mail, it takes a mighty feat of adroit reasoning to discover that in the last sentence of that Section "service" merely has "relation to the conditions under which the carriage is performed". (See Joint App., page 64).

The point in this: The word "service" is consistently used throughout the Act and throughout Section 401(f) in the meaning of carriage of persons, property or mail, or any combination of the three. In the grant of a certificate, the Board has the right to limit the scope of that "service" through specification. Such limitation, however, has nothing to do with what the Congress has conveyed directly when it has said "any . . . special (service) carriage of persons, property or mail, or any combination of the three" may be undertaken by an air carrier. And, of course, included in "special service" are "charter trips" (See Parts I, II, III, *supra*).

The Congress has said nothing about "class of traffic". The Board introduced that thought. The Congress made a distinction between "service" which the Board might *specify* and "service" of a special nature, which included charter trips, which the Congress said any air carrier could undertake.

It is not necessary in order to reach the above conclusion, to adopt the fallacious reasoning of the Board, set forth on pages 64-65 of the Joint Appendix, that any service not specified by the Board, is, therefore, a "special service" granted by Congress. The Board is in error in making such a statement and in so doing has misapprehended Tigers' position when it attributed such specious reasoning to Tigers. What Tigers has contended for is what the statute says; that is: that a "special service" is comprehensive of charter trips; that Congress conveyed authority to conduct a "special service" directly to air carriers (which the Board admits); and that the word "service" as used in the statute must be consistently applied throughout the statute, wherever it is used.

It is quite conceivable that certain types of carriage which the Board did not specify to a given air carrier could not qualify as a "special service." The point would be, not that these types of carriage were not a "service", but that they were not "special". Necessarily, this would mean that a carrier, in this position, might not be able to undertake such carriage at all: (a) it could not undertake such carriage as a part of its route type operation because it was not specified; (b) it could not undertake such under the last sentence of 401(f) because it was not "special". Such a result is, however, completely compatible with the Act providing maximum flexibility to the Board in selecting the carrier best equipped to conduct various types of "service" in a route type operation. (See Part V, *infra*). It is further completely compatible with the determination of Congress that rights to conduct "any . . . special service" are matters beyond Board authority ex-

cept as the Board initially determines who may or may not be an air carrier.

B) The other major contention of the Board is, basically, that it is inconceivable that Congress could have reached the view which it did. (See Joint App., pp. 64-66) Principally, this position of the Board is based upon the error in reasoning discussed in Part IV A) above. The Board, in effect, envisages a series of dangers which it says is inherent in Tigers' position and then concludes that Congress could not have reached any such result.

The Board, for example, says "in the light of these consequences, we cannot accept as reasonable an interpretation of 'special service' as meaning all services other than those prescribed in a particular certificate." The Board, not the Tigers and not the statute, suggested the interpretation of which the Board complains! It is neither good law nor good reasoning to attempt positively to find out what a statute means by asserting a series of propositions which cannot be logically deduced from that statute or defended under it; and then finding such propositions to be unreasonable.

The tariff which raised the question was duly and properly filed under regulations issued by the Board. Those regulations (see Part III, above, and Appendix A, herein) envisaged specifically the type of filing made by Tigers. The Board objected to the filing and suspended the tariff as incompatible with the statute. But the Board does not attempt to say what the statute positively means; it merely contents itself with rejecting Tigers' position. In part, it does this by asserting as Tigers' position propositions for which Tigers nowhere contends and by reaching the conclusion that such propositions could not be "reasonable" under the statute.

This approach does not explain the statute. It is the Board's positive duty to analyze the language of the Act; and the Board may not escape this duty merely by attempting to rebut Tigers' position.

The only effort at positive reconciliation by the Board of its conclusions with the language of the statute is the argument discussed in Part IV A), above, in which the Board attempts to validate its position through the introduction of the concept, "class of traffic". It is submitted that these arguments of the Board are not supported by the language of the statute, and, in fact, represent an effort of the Board to substitute its judgment for the judgment of the Congress in granting authority directly to an air carrier to undertake a special service, including the special service of conducting charter trips.

Part V

The Legislative History of the Regulatory Scheme of the Civil Aeronautics Act Supports the View Contended for by Tigers. Contrary to Suggestions Made by the Board, the Legislative Scheme Erected by the Congress in the Civil Aeronautics Act Clearly Envisaged Treatment for Special Services, Including Charter Trips, and for Contract Operations Quite Different from the Treatment Accorded Route Type Common Carriage Operations.

A) The Act, by its own terms, divides the types of service covered by it into three categories. One category it leaves unregulated. This is contract service. A second category it leaves regulated but removes from the regulatory body any authority to determine whether or not such service may be conducted by an air carrier. This is special service, including charter operations.

A third series of services is highly regulated. With respect to such, the Board is authorized to inquire not only as to the fitness, willingness and ability of a given carrier to perform them, but is authorized further to determine whether any such services should be performed and, if so, the terms and conditions of performance, including specification of the services that may be rendered by the air carrier. This category is the ordinary, everyday route type service of a common carrier.

Any view of the statute which does not recognize the existence of these distinct types of regulatory schemes, ignores the plain provisions of the statute itself. Any interpretation of the statute which attempts to distort and bring under control of the Civil Aeronautics Board matters which are left free from Board control by the statute is in defiance of the regulatory mechanism established by the Congress.

It is not for the Board, or the Courts, to impose their will and to erect a regulatory scheme which in their wisdom would better serve the people of the nation. (See *U. S. v. Fisher*, 2 Cranch. 358(1804); *Traveler's Insurance Co. v. Conn.*, 185 U.S. 364(1902); *U. S. v. Monia*, 317 U.S. 424(1943)). That is a matter left to the Congress. The Board and the Courts may interpret the statute but any such interpretation must be consonant with the legislative scheme which recognizes clearly three distinct aspects of regulatory control.

Appendix A, herein, contains pertinent provisions of the Civil Aeronautics Act which established the regulatory scheme pointed out above. By virtue of Section 1(10) and Section 1(21), the scope of the Act is specifically limited to services rendered by a carrier as a "common carrier". Services which are not rendered by a carrier as a "common carrier" are not under the Act. Accordingly, contract carriage is free from economic regulation of the Board.

It is not necessary to the discussion here, but it may be pointed out that under existing decisions, a common carrier, such as the Tigers, may also be a contract carrier or private carrier. (See *Railroad Co. v. Lockwood*, 84 U.S. 357, 377 (1873); *Chicago M. & St. P. R. Co. v. Wallace*, 66 F. 506, 511 (1895); *Robertson v. Old Colony R. Co.*, 31 NE 650 (1892); *Coup v. Wabash St. L. & P. Ry. Co.*, 22 NW 215 (1885). In undertaking certain services as a contract or private carrier, Tigers may perform operations completely beyond the regulatory powers of the Board, inso-

far as economic regulation is concerned. On the other hand, any carrier, whether conducting operations in common carriage, conducting exclusively contract operations or conducting a co-mingling operation, is bound by the Civil Aeronautics Act insofar as safety considerations are involved. In other words, the Act by its own terms recognizes that while all "air commerce" is subject to *safety* regulations by Executive authority, in economic matters certain classes of service are entirely exempt from federal administrative control and others are under only limited control.

An examination of the provisions of the Act indicates full authority reposes in the Board with respect to the determination of rights of air carriers to undertake regular route pattern services. On the other hand, it is equally clear that where special services are involved, the authority to undertake has automatically been made available by the Congress to the air carriers directly. No effort has been made to elaborate in detail or to grant to an administrative body powers of discretion with respect to the authority to undertake such special services.

B) The legislative history of the Civil Aeronautics Act shows that during the time aviation legislation was pending there was considerable uncertainty as to whether economic regulation should be confined to scheduled operations or whether it should also cover non-scheduled common carrier services such as charter operations. This question was raised on a number of occasions during the hearings on the bills, it being contended by some that only scheduled operations should be subject to economic regulation¹ and, in fact, the aviation bill reported favorably by

¹ 74th Cong., 1st Sess., Senate Committee on Interstate Commerce, Hearing on S. 3027, pages 70-71, 73, 104, 128; 75th Cong., 1st Sess., House Committee on Interstate and Foreign Commerce, Hearings on H. R. 5234 and 4652, pages 252, 260-261, 341; 75th Cong., 1st Sess., Subcommittee of Senate Committee on Interstate Commerce, Hearings on S. 2 and 1760, pages 79, 98, 100, 500-501. See also: Report of Federal Aviation Commission, which limited its recommendations for control by certificates of public convenience and necessity to scheduled air services (pages 9, 54, 99-103).

the Senate Committee on Interstate Commerce in the 1st Session of the 74th Congress² required economic certificates only for scheduled operation.³ The Congressional debate in the final stages of the legislation continues to show this uncertainty.⁴

The problem eventually was settled by making all common carrier operations subject to Title IV of the Act, but in the manner discussed above. In the final settlement there was no comprehensive regulation of charter and similar services spelled out in the Act and no command to undertake such regulation. This is in distinct contrast with the provisions dealing with route-type, scheduled operations. The provisions of Section 416 authorizing the Board to provide for the exemption from economic regulations of carriers and services of a limited nature or special character makes abundantly clear the Congressional intent to provide minimum regulation for "any . . . special service".

The legislative history makes clear that one of the principal reasons for the insertion of Section 416 was the desire to avoid imposing a rigid framework of economic regulation for charter and similar services. The final form of the Act reflects a Congressional intent to impose a minimum economic regulation upon charter and similar services.

The Act by its terms does not require the imposition of certificate and other economic regulations to such services. Indeed, insofar as the right to conduct special services is concerned, the Act conveys the authority independently of the Board and provides a framework of minimum regulation or necessity therefor in the exercise of the right by air carriers.

C) This view of the Act, derived from the reading of the Act itself and from the legislative history surrounding the preparation of the Act, has, until this case, been

² S. 3420, as reported by Senate Report No. 1329, 74th Cong., 1st Sess.

³ See also: S. 2, 75th Cong., 1st Sess.

⁴ For example, Congressional Record, 75th Cong., 3rd Sess., pages 8761, 9030, 9336-9340.

supported by the position consistently taken by the Board itself. The Board has recognized ever since the Civil Aeronautics Act became effective, that economic regulation of charter services (as distinguished from the route type so-called non-scheduled services now being operated by many irregular air carriers) was not required by the Act or its basic purposes. In 1938, one of the first actions of the Board was to issue an order exempting operators of charter and other non-scheduled services from the certificate and other requirements of Title IV of the Act. As a result of the continuance of such exemption, operators who hold no certificates at all under the Act have been permitted by the Board to operate charter services free from practically all of the basic economic regulations.

The Board reaffirmed this position, so far as legitimate charter services are concerned, in its opinion of May 25, 1950, on irregular air carriers, where the Board said (mimeographed opinion, page 20; In the Matter of the application for Individual Exemptions filed by Large Irregular Carriers, Docket No. 3848, et al., Aviation Law Reporter, C.A.B. Cases, p. 16882):

“We have also concluded to grant exemptions to those Large Irregular Carriers who in the past have been furnishing truly irregular services. Apparently, there is a need for such services. Although the certificated air carriers are authorized by Section 401(f) of the Act to conduct special and charter services without regard to the points named in their certificates, they apparently have not, and probably cannot, fully satisfy the uncertain and unpredictable demand for air transportation which is being met by some of the Large Irregular Carriers. Thus, the air transportation activities of these irregular carriers to a large extent consist of such operations as charter flights for athletic teams, business men’s organizations, and similar groups; flights involving unusual and generally non-repetitive movement of property; and off-route, odd-hour, and emergency flights of passengers and property. The Irregular Carriers who have entered this market have

rendered services which fill, in some respects, the interstices of the certificated route system and continuance of those operations will have no adverse effect upon the certificated carriers."

It is clear that Tigers' position cannot be rejected on the premise that the construction of Section 401(f) for which Tigers contends violates the basic purposes of the Act. Tigers' construction is entirely consistent with the regulatory purposes and framework of the Act and with the Board's own construction through its actions in the field of charter service. The Act does not permit the imposition by the Board of rigid economic controls on charter and special services and provides a mechanism for eliminating all such controls. At the time Congress framed the final form of the last sentence of Section 401(f) Congress was completely aware of, and had provided for, a direct grant of authority to air carriers to undertake charter and special services (See Part II, above).

It is not, therefore, a departure from the need for regulation, as seen by Congress, to conclude that the charter authority granted automatically to certificated carriers was a broad one and not limited by the conditions of the certificate imposed on the carriers' regular services. Indeed, the Act itself, the history surrounding its enactment and the consistent view of the Board requires recognition of a three-phase regulatory scheme under which *only* route-type service is subjected to detailed economic review of the Board. As a corollary, charter and any other special service is subjected to minimum economic regulation, and contract service to none at all.

CONCLUSION

The order of the Civil Aeronautics Board, from which appeal is here taken, is based upon an erroneous interpretation of the Act. The Act itself, the appropriate legislative history surrounding it, the consistent interpretations of the Board and Courts all require a reversal of the Order inso-

far as the Tigers is concerned. The judgment of the Board should be reversed with instruction to accept the filing of a Tiger tariff covering the service covered in Flying Tiger Line Passenger Charter Tariff No. 2, C.A.B. No. 23 and with the further instruction to permit the same to become effective, unless found by the Board to be defective because of matters other than those herein decided.

Respectfully submitted,

NORMAN L. MEYERS

ELMER E. BATZELL

201 Shoreham Building

Counsel for the Flying Tiger Line, Inc.

Certificate of Service

I hereby certify that I have served this brief upon the respondent by mailing copies properly addressed, with postage prepaid, to each of the following: Emory T. Nunneley, General Counsel, Civil Aeronautics Board, Commerce Bldg., Washington 25, D. C., and James McGranery, Attorney General of The United States, Department of Justice, Washington 25, D. C.

Dated at Washington, D. C., December 19, 1952.

NORMAN L. MEYERS

Counsel for the Flying Tiger Line, Inc.

APPENDIX A**Statutes and Regulations Involved**

I. The following provisions of the Civil Aeronautics Act of 1938, as amended, are pertinent:

§ 1. Definitions.

As used in this chapter, unless the context otherwise requires—

(2) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation; PROVIDED, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.

(3) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively— . . .

§ 401. Certificate of public convenience and necessity.

(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation: . . .

(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and services as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Board, between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board.

§ 416. Classification and exemption of carriers.

(a) The Board may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this subchapter as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this subchapter, to be observed by each such class or group, as the Board finds necessary in the public interest.

(b)(1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this subchapter or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this subchapter or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

II. The following provisions of the Economic Regulations Part 207, are pertinent:

§ 207.1. *Definitions.* As used in this Part, unless the context otherwise requires—

(a) "Charter trip" means air transportation performed by an air carrier holding a certificate of public convenience and necessity where the entire capacity of one or more aircraft has been engaged for the movement of persons and their baggage or for the movement of property, on a time, mileage or trip basis. . . .

(c) "Special services" are all services rendered in air transportation which are authorized by section 401(f) of the Act by an air carrier holding a certificate of public

convenience and necessity other than (1) services rendered in air transportation over the route or routes designated in its certificate(s), (2) charter services as defined herein, and (3) services authorized by special exemption under section 416(b) of the Act.

§ 207.2. *Applicability of Part.* This part shall apply to all air carriers (other than Alaskan air carriers) who hold currently effective certificates of public convenience and necessity issued by the Board pursuant to section 401 of the Act.

§ 207.4. *Tariffs to be filed for charter trips and special services.* No air carrier shall perform any charter trips or other special services unless such air carrier shall have on file with the Board a currently effective tariff showing all rates, fares, and charges for such charter trips and other special services, and showing the rules, regulations, practices, and services in connection with such transportation.

BRIEF FOR RESPONDENT

**United States Court of Appeals
For the District of Columbia Circuit**

No. 11,529

THE FLYING TIGER LINE, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

*United States Court of Appeals
For the
District of Columbia Circuit*

On Petition for Review of an Order of the
Civil Aeronautics Board

FILED JAN 29 1953

Joseph W. Stewart

CLERK

EDWARD P. HODGES,
*Acting Assistant
Attorney General,*

DANIEL M. FRIEDMAN,
*Special Assistant to
the Attorney General,
Department of Justice,
Washington 25, D. C.*

EMORY T. NUNNELEY, JR.,
*General Counsel,
Civil Aeronautics Board,
Washington 25, D. C.*

JOHN H. WANNER,
Associate General Counsel,

JAMES L. HIGHSAW, JR.,
*Chief, Litigation and
Research Division,*

O. D. OZMENT,

LESTER M. BRIDGEMAN,
*Attorneys,
Civil Aeronautics Board,
Washington 25, D. C.*

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether Section 401(f) of the Civil Aeronautics Act authorizes an air carrier which is certificated to transport property only to conduct charter operations for the carriage of persons.

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BRIEF FOR RESPONDENT

COUNTERSTATEMENT OF THE CASE

Petitioner is an air carrier holding a certificate of public convenience and necessity, issued in July, 1949 (J.A. 9), which authorizes it to engage only in "air transportation with respect to property" (J.A. 7). In April, 1951, following promulgation by the Board of regulations for the conduct of charter trips and special services by certificated carriers (14 C.F.R. 207 *infra*, p. 13), petitioner filed with the Board a tariff covering charter flights for passengers on a common carrier basis (J.A. 10, 13).¹ This tariff purportedly was filed pursuant to Section 401 (f) of the Civil

¹ In December, 1949, five months after its certificate had been issued, petitioner had filed with the Board its first tariff for charter flights. This tariff covered the transportation of both persons and property. The Board rejected this tariff, informing petitioner that since its certificate did not authorize it to transport passengers, it could not engage in charter transportation of passengers (see Appendix A, *infra*, p. 13). Petitioner did not contest this informal ruling, but in January, 1950, filed a new charter tariff limited to transportation of property. Charter tariffs for the transportation of property have been maintained by petitioner since that date.

Aeronautics Act (52 Stat. 987, 49 U.S.C. 481 (f)), and the Board's regulations thereunder. Section 401 (f) authorizes any certificated air carrier "to make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board."

Other air carriers filed formal complaints to the tariff, the Board instituted an investigation into the lawfulness of the tariff, and suspended its effectiveness. After full administrative proceedings, unchallenged as to regularity, the Board held the tariff unlawful on the ground that Section 401(f) and the Board's regulations thereunder permitted charter trips with respect to only that class of service for which the carrier was certificated, i.e., in petitioner's case, the transportation of property (J.A. 63, 64, 55). The Board accordingly entered the order under review, which directed that petitioner's tariff be cancelled.

The Board's order relates solely to common carriage of persons on charter flights. It does not deny petitioner's right to engage in the charter transportation of property under effective property charter tariffs, nor does it affect petitioner's right to engage in private or non-common carriage of both persons and property, or to conduct other non-certificated passenger and property flights pursuant to special exemption orders of the Board. The "substantial complementary" charter business developed by petitioner (Br. p. 3) consists of operations falling within the aforementioned categories of permissible charter operations.²

² In obtaining its certificate, petitioner stated that it then had no intention of engaging in the transportation of persons (J.A. 27-29). Subsequent to the issuance of the certificate, a number of exemption orders authorizing the transportation of persons have been issued to petitioner. See *e.g.*, Board Orders Serial Nos. E-4073, dated April 14, 1950; E-4302, dated June 9, 1950; E-4411, dated July 12, 1950; E-5479, dated June 28, 1951; E-5478, dated June 28, 1951; E-5627, dated August 20, 1951; E-6121, dated February 14, 1952. Petitioner, together with other carriers certificated to carry cargo only, is presently conducting, pursuant to exemption order (Order E-6934, dated October 13, 1952), various passenger charter operations on behalf of the military establishment.

STATUTES AND REGULATIONS INVOLVED

Pertinent portions of the Civil Aeronautics Act of 1938 (52 Stat. 973), as amended (49 U.S.C. 401 *et seq.*), are set forth as an appendix to petitioner's brief. Part 207 of the Board's Economic Regulations (14 C.F.R. 207), is set forth in Appendix B hereto.

SUMMARY OF ARGUMENT

I

Section 401(a) of the Civil Aeronautics Act prohibits all air transportation services by an air carrier except those services authorized by the carrier's certificate of public convenience and necessity. Section 401(f) requires, *inter alia*, that certificates shall specify (1) the points to be served by the carrier, and (2) the service to be rendered. The last sentence of Section 401(f) provides that "any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board." The charter trips and special service mentioned in the last sentence of Section 401(f) relate only to air transportation services.

The last sentence of Section 401(f) provides an exception to the limitation in that section that services shall not be conducted except between points named in the certificate. No exception is provided to the limitation that a carrier shall engage in only that service specified in its certificate. Petitioner is certificated to engage in only cargo service, and accordingly its right to engage in charter trips and special services is similarly limited.

The legislative history of the Act is silent on the problem here involved. The Board has never placed any different construction upon the sentence.

II

Part 207 of the Board's Economic Regulations, which regulates the conducting of charter trips and special services by certificated air carriers, does not purport to broaden the authority conferred by Section 401(f). The regulation

merely prescribes rules for the conducting of those charter trips otherwise permitted by the statute. It confers no authority beyond that conferred by Section 401(f).

ARGUMENT

I.

Section 401(f) of the Act Limits Charter Operations by Certificated Air Carriers to the Class and Type of Service Specified in the Carrier's Certificate.

Petitioner contends that, as the holder of a certificate of public convenience and necessity, it is authorized by the last sentence of Section 401 (f) of the Civil Aeronautics Act to transport persons on a charter basis even though its certificate authorizes only cargo operations. The Board held that the incidental authority to engage in charter trips and special services conferred upon the certificate holder by Section 401(f) relates only to the class of service specified in the certificate, and that petitioner accordingly lacks authority to transport passengers on a charter basis. This construction of the Act by the Board is, we submit, clearly correct.

Section 401(a) of the Act (52 Stat. 987, 49 U.S.C. 481(a)) provides that "no air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation." "Air transportation," as defined by the Act, includes three major classes of service: (1) the common carriage by aircraft of persons, (2) the common carriage by aircraft of property, and (3) all carriage by aircraft of United States and foreign-transit mail (Sections 1(10), 1(21), 1(23); 52 Stat. 977, 49 U.S.C. 401(10), 401(21), 401(23)).

Petitioner is certificated to "engage in air transportation with respect to property" (J.A. 7). Both its operations under its certificate, and the passenger charter trips which it proposed under the tariff here at issue (J.A. 13), clearly constitute "air transportation" under the Act. The "charter trips" and "other special services" referred to in the

last sentence of Section 401(f) relate only to activities in "air transportation." *Pacific Northern Airlines v. Alaska Airlines*, 80 F. Supp. 592, 604 (D.C. Alaska, 1948).³

The statutory authority to conduct charter trips or perform any other special service is an integral part of, and must be interpreted in the light of, the general provisions relating to certificates of public convenience and necessity contained in Section 401(f). That Section provides, *inter alia*, that each certificate issued shall specify (1) "the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation," and (2) "the service to be rendered." Thus, each certificate must specify both the *places* which the air carrier is to serve, and the *services* which it is to render.

The last sentence of Section 401(f) contains a limited exception to these requirements. It provides that

Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board.

In other words, certificated air carriers may depart from the geographical limitations in their certificates in the case of charter trips and special services, and serve any place whether or not it is a point for which they are certificated.

That—and no more—is the extent of the exemption from the certificate limitations provided by the last sentence of Section 401(f). That sentence does not give air carriers *carte blanche* to offer any charter or special service in excess of the specific services for which they have been certi-

³ This case—the only judicial decision dealing with the last sentence of Section 401(f)—does not involve the problem presented in the instant case. The court there stated, however, that the provision constitutes "a quasi exemption" from the requirements of Section 401, which otherwise would require specific certificate authorization for charter trips and special services. 80 F. Supp. at 603 and 604.

We do not acquiesce in petitioner's apparent view (Br. p. 30) that all or most so-called "contract carriage" constitutes private carriage, and therefore does not constitute "air transportation". This question, however, is not presented by this case.

ficated. On the contrary, we think that the specification of "points named in the certificate" in the last sentence, as against the requirement in the first sentence that the certificate must specify *both* the points to be served and the service to be rendered, manifests a clear Congressional intent not to exempt charter flights and special services from certificate restrictions as to type of service. Cf. *Crescent Express Lines v. United States*, 320 U.S. 401(1943).⁴ Had Congress intended the exception to cover both places and services, it would have stated so in explicit language. In the absence of such clear intent, however, there is no warrant for re-writing the last sentence, as petitioner would do, to read:

Any air carrier may make charter trips or perform any other special service, without regard to the points named *or the service to be rendered specified* in its certificate * * *

A simple example will, we believe, drive home the fallacy of petitioner's contention. Under Section 401(f) the Board may impose any limits on the service to be rendered that the public interest requires. Cf. *Crescent Express Lines v. United States*, 320 U.S. 401, 408 (1943); *American Airlines v. Civil Aeronautics Board*, 89 App. D.C. 365, 192 F. 2d 417 (1951). Thus, a certificated carrier's authority to transport freight may be restricted to the carriage of particular commodities between particular localities.⁵ For example, the Board might certificate a carrier to transport newspapers, cut flowers, live seafood or any other commodities that the public interest might dictate. Under petition-

⁴ In the *Crescent* case the Supreme Court considered the relationship between the prohibition in Section 208 of the Motor Carrier Act (49 Stat. 552, 49 U.S.C. 308) against the imposition by the Commission of conditions in certificates of public convenience and necessity restricting the right of the carrier to add equipment, and the Commission's power to "specify the service to be rendered." 320 U.S. at pp. 408-409. The Court held that the Commission had power to limit the service to vehicles of a specified capacity.

⁵ To date, however, air carriers certificated by the Board to transport property have been authorized to carry commodities generally.

er's construction of the Act, however, this narrow operating authority would permit the carrier to render charter service covering any commodity to any point it wished to serve. Nothing in Section 401(f) indicates that Congress intended to make the exemption that broad when it provided that a carrier could render charter service "without regard to the points named in its certificate."

Petitioner argues that the last sentence of Section 401(f) should not be treated as an exception to the statutory provisions which precede it, but should be viewed as an affirmative grant to any certificate holder of the right to engage in charter trips and special services as to all classes of air transportation. There are no prior Board decisions which support petitioner's position,⁶ and we submit that the contention is without merit.

We recognize that as a matter of grammar the sentence involved consists of an independent clause and two dependent phrases which modify that clause (Pet. Br. p. 7), and this is true irrespective of whether a comma precedes the dependent phrase "without regard to the points named in its certificate."⁷ The fact that the sentence is grammati-

⁶ The Board has heretofore held that carriers authorized to engage in the air transportation of persons need no additional certificate authority to engage in charter and special services with respect to persons and that their authority in this respect stems from the Act itself (Pet. Br. p. 21). The Board held the same thing in this case with respect to the transportation of property by petitioner. The Board's regulations implementing Section 401(f) do not purport to deal with the question here presented (See *infra*, p. 11). This is the first instance in which the Board has had occasion formally to rule upon the question of whether a carrier authorized to engage in only one class of service may conduct charter trips with respect to other classes of service.

⁷ We fail to perceive the relevancy of petitioner's contentions concerning this comma (Br. p. 10, 14) since the sentence means the same with or without the comma. The presence or absence of commas are generally regarded as of little significance in statutory construction, e.g., *Northern Pacific R.R. Co. v. United States*, 227 U.S. 355 (1913); *Hammock v. Farmers Loan & Trust Co.*, 105 U.S. 77 (1881). The offsetting of a phrase by a comma is of significance primarily in determining whether the qualifying phrase was meant to modify only the last preceding antecedent or all that has gone before. If a comma is inserted, the intent is clear that all antecedents were intended to be modified. *Service Inv. Co. v. Dorst*, 232 Wis. 574, 288 N.W. 169

cally complete, however, affords no basis for construing it without regard to the remainder of the statute. Moreover, the so-called "independent clause" providing that "any air carrier may make charter trips or perform any other special service", standing alone, does not authorize the conducting of such service with respect to all classes of air transportation. On the contrary, as the Board pointed out, the clause is silent as to the classes of service which may be provided on a "charter" or "special service" basis since the term "special service" obviously relates to the conditions under which transportation is performed rather than to the class of "service to be rendered" (See J.A. 64, 65). Petitioner's view (Br. pp. 26-27) that the term means more and was intended to authorize the transportation on a special basis of all classes of traffic is wholly unpersuasive. Under that view, a carrier authorized to transport only property may also transport mail, despite the clear statutory provisions that mail is to be transported only by carriers certificated by that purpose, except in cases of emergency (Sec. 405(k), 52 Stat. 994, 49 U.S.C. 485(k)) and pursuant to contracts under the experimental air mail service act (39 U.S.C. 470; see Sec. 405(l), 49 U.S.C. 485(l)).⁸

Nor can petitioner find support for its contentions in the legislative history of the Act. The legislative history is

(1939). The comma concerned, if it has any significance, means only that the phrase involved applies to both "charter trips" and "special service", a fact apparent from the face of the statute since charter trips are a form of special service.

⁸ The Board's view that "special service" relates to conditions under which the transportation is performed is in accord with the views of the Interstate Commerce Commission under the Motor Carrier Act. Section 208(c) of the Interstate Commerce Act (49 Stat. 552, 49 U.S.C. 308(c)) provides that motor carriers authorized to transport persons over regular routes may transport "special or chartered parties" of persons "under such rules and regulations as the Commission shall have prescribed." Section 207(a) (49 Stat. 551, 49 U.S.C. 207(a)) authorizes the Commission to issue certificates authorizing only the transportation of persons "in special or charter operations." The Commission has defined "special or chartered parties" under Section 208(c) as embracing only charter parties, i.e., a group of persons who, under a single contract, have acquired exclusive use of the vehicle. *Regulations, Special or Chartered Party Service*, 29 M.C.C. 25, 36,

silent with respect to the problem here involved.⁹ Petitioner's theory (Br. p. 19) that the phrase "without regard to points named in its certificate" was inserted to preclude the limiting of charter and special flights to and from certificated points rests upon pure surmise.¹⁰ And even if it was intended to have that effect, that fact still would not establish any right on the part of air carriers to handle all classes of traffic on such flights. The problem of "off-line flying" adverted to by petitioner (Br. p. 17) had to do with scheduled services over routes other than those on which mail was transported, and we do not understand petitioner to contend that Section 401(f) authorizes the establishing of regularly scheduled services between non-certificated points.

It is true that considerable attention was directed during the Congressional hearings to the problem of whether both scheduled and non-scheduled operations were to be included within the coverage of the Act (Pet. Br. p. 31). Contrary to petitioner's view of the matter, however, that problem was resolved by subjecting *all* common carrier operations to regulation by the Board.¹¹ There is no discernible Con-

47 (1941). "Charter operations" under 207(a) are similarly defined, whereas "special operations" are regarded as transportation furnished on special occasions to a number of passengers which the carrier itself has assembled into a travel group through the sale of individual tickets. *Fordham Bus Corp. Application*, 29 M.C.C. 293, 297 (1941).

The Board has not attempted to ascribe precise meaning to the term "special service" as it appears in the Civil Aeronautics Act (See 14 C.F.R. 207.1(c), *infra*, p. 16, and J.A. 65).

⁹ The last sentence of Section 401(f) and its predecessors were not commented upon either in the Congressional debates or in the Committee reports. Similarly, research discloses no mention of these provisions in the Committee hearings on the various aviation bills which culminated in the Civil Aeronautics Act.

¹⁰ The Board does not concede that it cannot so limit charter and special flights, and as a matter of fact has done so with respect to Alaskan carriers (See 14 C.F.R. 292.2(b)).

¹¹ See *e.g.*, the statutory definition of air transportation, *supra*, p. 4, and *Alaska Air Transport v. Alaska Airplane Charter Co.*, 72 F. Supp. 609 (D.C., Alaska, 1947).

We again emphasize (note 3, p. 5, *supra*) that no question is here presented as to what charter operations constitute common carriage.

gressional intent to leave any phase of air transportation free of regulatory control except to the extent found necessary by the Board in the exercise of its exemption power under Section 416 of the Act (52 Stat. 1004, 49 U.S.C. 496).

The Board's interpretation of the last sentence of Section 401(f) thus accords with accepted canons of statutory construction, and is not at variance with the legislative history of the Act. There is no departure from prior precedents, but rather an adherence to the Board's initial view expressed in January 1950, that petitioner is not authorized by Section 401(f) to transport persons (*infra*, p. 13). Moreover, the Board's interpretation furthers the developmental purposes of the Act (Section 2, 52 Stat. 980, 49 U.S.C. 402). It insures that carriers authorized to engage in only limited classes of service will in fact devote their energies and efforts to that type of service, thus providing maximum development of the class of service for which certificated. It permits the certification of carriers for limited operations such as the transportation of newspapers, cut flowers, and the like, without disturbing the competitive balance in the charter field with respect to other types of service (See L.A. 49, 50). Under all of the foregoing circumstances, the Board's construction is reasonable and proper, and of controlling weight. *American Airlines v. Civil Aeronautics Board*, 178 F. 2d 903, 909, 910 (C.A. 7, 1949); cf. *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 153-154 (1946); *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111, 130 (1944).

II.

The Board's Regulation Implementing Section 401(f) Confers No Right Upon Petitioner to Engage in Charter Trips and Special Services With Respect to Persons.

Petitioner further contends that the Board's regulation implementing Section 401(f) (Part 207 of the Economic Regulations *infra.*, p. 13) confers a right upon petitioner to engage in charter and special trips with respect to persons (Br. p. 5). But that regulation was not adopted pursuant to the general exemption powers of the Board, nor did it purport to broaden the authority conferred by Section 401(f). Rather, the Board in adopting the regulation was merely prescribing rules for the conducting of those charter and special trips otherwise permitted by the statute (See 14 C.F.R. 207.1(c), *infra.*, p. 16). The regulation defines a charter trip as one for the movement of "persons . . . or . . . property" (14 C.F.R. 207.1(a), *infra* p. 15), and not one for the movement of persons *and* property. The Board's regulation did not purport to broaden the statutory exemption, and any attempt to have done so in an implementing regulation would have been beyond the Board's power and invalid. *Miller v. United States*, 294 U.S. 435, 439 (1935); *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U. S. 129, 134 (1936).

CONCLUSION

Upon the basis of the foregoing reasons and authorities,
the Board's order should be affirmed.

Respectfully submitted,

EDWARD P. HODGES,
*Acting Assistant
Attorney General,*

DANIEL M. FRIEDMAN,
*Special Assistant to
the Attorney General,
Department of Justice,
Washington 25, D. C.*

EMORY T. NUNNELEY, JR.,
*General Counsel,
Civil Aeronautics Board,
Washington 25, D. C.*

JOHN H. WANNER,
Associate General Counsel,

JAMES L. HIGHSAW, JR.,
*Chief, Litigation and
Research Division,*

O. D. OZMENT,
LESTER M. BRIDGEMAN,
*Attorneys,
Civil Aeronautics Board,
Washington 25, D. C.*

January, 1953.

APPENDIX A

CIVIL AERONAUTICS BOARD
WASHINGTON 25

January 11, 1950

REJECTION NOTICE No. 486

Mr. J. D. Gardner
Manager, Rates and Tariffs
The Flying Tiger Line, Inc.
Lockheed Air Terminal
Burbank, California

Dear Mr. Gardner:

The Flying Tiger Line, Inc. Official Charter Tariff No. 1, C.A.B. No. 12, received December 12, 1949, marked to become effective January 12, 1950, is hereby rejected because it names rates and charges for charter transportation of passengers, whereas, you are not authorized to transport passengers under the terms of the Certificate of Public Convenience and Necessity issued to you by the Board.

Sincerely yours,

/s/ Robert J. G. McClurkin
Robert J. G. McClurkin
Director
Bureau of Economic Regulation

APPENDIX B

CIVIL AERONAUTICS BOARD,
ECONOMIC REGULATIONS,

PART 207—CHARTER TRIPS AND SPECIAL SERVICES

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 16th day of March 1951.

Section 401(f) of the Civil Aeronautics Act authorizes the Board to regulate the performance of charter trips or other special services by certificated air carriers. Up to the present time we have issued no regulation covering the

performance of charter trips and special services by certificated air carriers except in the case of Alaskan air carriers and except, during the period of the war, for a regulation prohibiting such services without the permission of the appropriate military authorities. Developments during the past three years, particularly in the field of foreign and overseas air transportation, have made it increasingly apparent that some measure of control should be exercised in this field. Accordingly, the Board is establishing herein the general framework under which charter trips and special services may be encouraged and wasteful competitive practices therein curtailed, so as to fulfill the basic policy of the act as set forth in section 2 thereof.

Since this new part relates only to charter trips and special services in air transportation performed by certificated air carriers, it will not apply to the activities of the non-certificated irregular carriers, to bona fide non-common carrier operations, nor to other services not in air transportation, such as local sight-seeing flights wholly within the boundaries of a single state, territory or possession.

Interested persons have been afforded an opportunity to participate in the making of this regulation, and due consideration has been given to all relevant matter presented.

In consideration of the foregoing, the Civil Aeronautics Board hereby amends the Economic Regulations (14 CFR Chapter I) effective May 1, 1951,

(1) By adding thereto a new part 207, to read as follows:

Sec.

- 207.1 Definitions.
- 207.2 Applicability of part.
- 207.3 Scope of authorization.
- 207.4 Tariffs to be filed for charter trips and special services.
- 207.5 Limitation on amount of charter and other special services which may be performed.
- 207.6 Charter trips and other special services within the Territory of Alaska.

- 207.7 Charter trips and other special services to or from points served by another carrier.
- 207.8 Charter trips and other special services in overseas and foreign air transportation over routes of another carrier.
- 207.9 Notice of proposed special services.
- 207.10 Part-way carriage of through traffic subject to § 207.7.
- 207.11 Temporary authorization for National Defense transportation.

AUTHORITY: §§ 207.1 to 207.11 issued under sec. 205, 52 Stat. 984; 49 U. S. C. 425. Interpret or apply secs. 401, 403, 52 Stat. 987, 992; 49 U. S. C. 481, 483.

§ 207.1 *Definitions.* As used in this part, unless the context otherwise requires:

(a) "Charter trip" means air transportation performed by an air carrier holding a certificate of public convenience and necessity where the entire capacity of one or more aircraft has been engaged for the movement of persons and their baggage or for the movement of property, on a time, mileage or trip basis.

(1) By a person for his own use,

(2) By a person (no part of whose business is the formation of groups for transportation or the solicitation or sale of transportation services) for the transportation of a group of persons as agent or representative of such group,

(3) By two or more persons acting jointly for the transportation of such group of persons, or their property,

(4) By an air freight forwarder holding a currently effective letter of registration issued under Part 296 or Part 297 of this subchapter for the carriage of property in air transportation.

Within the meaning of this part, a charter trip shall not be deemed to include transportation services offered by an air carrier to individual members of the general public or performed by an air carrier under an arrangement with a person (other than an air freight forwarder defined in subparagraph (4) of this paragraph who provides or offers

to provide transportation to the general public or transportation services engaged by persons paying for such services an amount aggregating in excess of the transporting carrier's duly published charter rate or fare.

(b) "Point" means any airport or place where an aircraft may be landed or taken off, including the area within a 50-mile radius of such airport or place.

(c) "Special services" are all services rendered in air transportation which are authorized by section 401 (f) of the act by an air carrier holding a certificate of public convenience and necessity other than (1) services rendered in air transportation over the route or routes designated in its certificate(s), (2) charter services as defined in this section, and (3) services authorized by special exemption under section 416 (b) of the act.

§ 207.2 *Applicability of part.* This part shall apply to all air carriers (other than Alaskan air carriers) who hold currently effective certificates of public convenience and necessity issued by the Board pursuant to section 401 of the act.

207.3 *Scope of authorization.* Charter trips and other special services may be performed by air carriers, subject, however, to the limitations and regulations set forth in the part. Apart from such trips and services, an air carrier shall not perform any air transportation except in conformity with its certificate of public convenience and necessity or with a special or general exemption issued by the Board.

§ 207.4 *Tariffs to be filed for charter trips and special services.* No air carrier shall perform any charter trips or other special services unless such air carrier shall have on file with the Board a currently effective tariff showing all rates, fares, and charges for such charter trips and other special services, and showing the rules, regulations, practices, and services in connection with such transportation.

§ 207.5 *Limitation on amount of charter and other special services which may be performed.* An air carrier shall

not during any calendar quarter perform charter trips or other special services (not counting charter trips or other special services performed between points designated to receive service by such carrier in its certificate of public convenience and necessity) which in the aggregate, on a revenue plane-mile basis, exceed $2\frac{1}{2}$ percent of the revenue plane-miles flown by it in scheduled air transportation during the preceding 12-month period.

§ 207.6 *Charter trips and other special services within the Territory of Alaska.* An air carrier shall not perform any charter trip or other special service in interstate air commerce within the Territory of Alaska.

§ 207.7 *Charter trips and other special services to or from points served by another carrier.* (a) No air carrier may perform charter trips or other special services between any pair of points (except where the carrier is authorized, or could be authorized, pursuant to the terms of its certificate of public convenience and necessity, to serve such points on a nonstop basis) which another carrier is authorized, or could be authorized, pursuant to the terms of its certificate of public convenience and necessity, to serve on a nonstop basis:

(1) In excess of a total of eight (8) flights in the same direction during any period of four successive calendar weeks,

(2) In the same direction on the same day of two or more successive calendar weeks,

(3) In excess of a total of three (3) flights between such points in the same direction during any period of two successive calendar weeks unless such period is followed by a break of at least one calendar week during which no flights are operated between such points,

(4) Which are so arranged as to result in the observance of breaks required by subparagraph (3) of this paragraph at regularly recurring intervals, or

(5) Which are so arranged as to result in any uniform pattern or normal consistency of operations between such points.

(b) The holder of a certificate of public convenience and necessity for local feeder service shall in addition be subject to the limitations set forth in paragraph (a) of this section with respect to charter trips and other special services between the terminal points of any segment of such carrier's route.

§ 207.8 *Charter trips and other special services in overseas and foreign air transportation over routes of another carrier.* An air carrier shall not perform any charter trip or other special service in overseas or foreign air transportation between points or areas between which another air carrier has been authorized to engage in air transportation by the Board through one or more certificates of public convenience and necessity (i) unless such carrier could be authorized, pursuant to the terms of its certificate of public convenience and necessity, to serve such points or areas on a nonstop basis, or (ii) pursuant to the provisions of either paragraphs (a) or (b) of this section.

(a) Such charter trip or other special service may be performed if the consent in writing therefor of such other carrier or carriers designated to offer service between the points involved has been obtained and such consent has been filed with or mailed to the Board in a properly addressed envelope with postage thereon prepaid, or

(b) Where specific authority to conduct the charter trip or special service has been granted by the Board upon a finding that the public interest so requires.

§ 207.9 *Notice of proposed special services.* No air carrier shall perform any special service in interstate, overseas or foreign air transportation unless at the time of filing of a tariff applicable to such special service or at the time of filing of an application for a special tariff permission, such air carrier shall have submitted to the Board a statement setting forth a full description of the proposed service and shall have mailed copies thereof to the air carriers authorized by certificates of public convenience and necessity to render service to any point designated to receive the proposed special service. The proposed special

service shall not be inaugurated if prior to the effective date of the tariff applicable to such special service, or at the time of action on the application for special tariff permission, the Board shall have notified such air carrier that the performance of such special service does not appear to be consistent with the public interest.

§ 207.10 *Part-way carriage of through traffic subject to §207.7.* With the exception of carriage performed wholly within the United States, a charter trip or special service shall be governed by the provisions of § 207.8, if either the place of origin or destination of the journey of the persons or property carried is a point or area outside the United States designated to receive service in a certificate of public convenience and necessity issued to another air carrier.

§ 207.11 *Temporary authorization for National Defense transportation.* For a period not to exceed six months after the effective date of this part, unless extended by order or orders of the Board, the limitations of §§ 207.5 to 207.10, inclusive, shall not apply to or in respect of charter trips performed pursuant to contracts with any department of the Military Establishment.

By the Civil Aeronautics Board.

[SEAL]

M. C. MULLIGAN,
Secretary.